

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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SECURITIES AND EXCHANGE COMMISSION, )

Petitioner, )

v. ) No. 22-859

GEORGE R. JARKESY, JR., ET AL., )

Respondents. )

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Pages: 1 through 156

Place: Washington, D.C.

Date: November 29, 2023

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6   GEORGE R. JARKESY, JR., ET AL.,       )  
7                                   Respondents.       )  
8   - - - - -

9  
10                                   Washington, D.C.  
11                                   Wednesday, November 29, 2023  
12

13           The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 10:05 a.m.  
16

17   APPEARANCES:

18   BRIAN H. FLETCHER, Principal Deputy Solicitor General,  
19       Department of Justice, Washington, D.C.; on behalf  
20       of the Petitioner.

21   S. MICHAEL MCCOLLOCH, ESQUIRE, Dallas, Texas; on  
22       behalf of the Respondents.  
23  
24  
25

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 22-859, the  
5 Securities and Exchange Commission versus  
6 Jarkesy.

7 Mr. Fletcher.

8 ORAL ARGUMENT OF BRIAN H. FLETCHER  
9 ON BEHALF OF THE PETITIONER

10 MR. FLETCHER: Thank you, Mr. Chief  
11 Justice, and may it please the Court:

12 Throughout our nation's history,  
13 Congress has authorized the agencies charged  
14 with enforcing federal statutes to conduct  
15 adjudications, find facts, and impose civil  
16 penalties and other consequences prescribed by  
17 law. More than a century ago, this Court  
18 described the validity of those statutes as  
19 settled beyond any possible constitutional  
20 question, and since the enactment of the APA,  
21 those and other administrative adjudications  
22 have often been conducted by officers specially  
23 appointed for the purpose and removable only for  
24 cause.

25 This Court should reject all three of

1 the Fifth Circuit's reasons for upsetting that  
2 longstanding and entrenched practice.

3 First, this Court's decision in Atlas  
4 Roofing considered many of the same arguments  
5 presented today and reaffirmed that Congress  
6 does not violate the Seventh Amendment when it  
7 authorizes an agency to impose civil penalties  
8 in administrative proceedings to enforce a  
9 federal statute. Respondents have not asked  
10 this Court to overrule Atlas or the long line of  
11 precedents on which it rested, and they also  
12 haven't identified any relevant distinction  
13 between that case and this one.

14 Second, Congress does not violate the  
15 nondelegation doctrine when it gives an agency  
16 the choice of pursuing administrative or  
17 judicial proceedings. The decision whether and  
18 how to pursue enforcement action is a  
19 quintessentially executive power, and Congress  
20 doesn't violate the Constitution when it leaves  
21 that decision to executive discretion, as it has  
22 traditionally done.

23 Finally, the APA's limited removal  
24 protection for ALJs is entirely consistent with  
25 this Court's decision in Free Enterprise Fund.

1     There, the Court confronted an unprecedented  
2     agency, a powerful law enforcement board, that  
3     was insulated from removal because -- by an  
4     unusually stringent provision and that was not  
5     subject to the SEC's control.

6             Here, in contrast, ALJs are purely  
7     adjudicative officers who are subject to the  
8     Commission's plenary control and review of their  
9     decisions, and the APA's modest for-cause  
10    removal standard gives the Commission ample  
11    authority to remove those ALJs if they fail to  
12    accept supervision.

13            I welcome the Court's questions.

14            JUSTICE THOMAS: But you do agree, Mr.  
15    Fletcher, that it depends on the type of right  
16    involved?

17            MR. FLETCHER: We do. We take this  
18    Court's statement of the public rights doctrine  
19    from Atlas Roofing and other cases, and the  
20    argument we're making here is limited to the  
21    particular strand of the public rights doctrine  
22    that the Court has described in Atlas and other  
23    cases.

24            JUSTICE THOMAS: And how would you  
25    define public rights?

1                   MR. FLETCHER: So I acknowledge, I  
2 think the Court has acknowledged most recently  
3 in Oil States, that the public rights concept is  
4 contested. The Court has never fully plumbed  
5 its outer perimeters. I think what I'd say is  
6 the strand of the doctrine that's relevant here  
7 is the same one from Atlas, which is, when the  
8 federal government, an agency, is enforcing a  
9 federal statute in its exercise of its sovereign  
10 powers, that's a matter involving public rights.

11                  JUSTICE THOMAS: If I don't agree with  
12 you that we're talking about public rights here,  
13 that private rights are involved, would you then  
14 think that it is required that it be adjudicated  
15 before an Article III court?

16                  MR. FLETCHER: So we haven't made an  
17 argument -- you know, there are some  
18 circumstances, cases like Schor and Thomas,  
19 where the Court has said in some circumstances  
20 it may be permissible to assign initial  
21 adjudication even involving private rights to  
22 non-Article III tribunals.

23                  We're not making an argument like that  
24 here. We're resting on the argument that this  
25 is a classic public rights case within this

1 Court's precedents and also we think properly  
2 viewed as a matter of first principles.

3 JUSTICE SOTOMAYOR: Mr. Fletcher,  
4 could you go directly to Justice Thomas's  
5 question? He's already written on this issue,  
6 and he thinks that a private right is any right  
7 that involves property, life, or liberty  
8 basically.

9 MR. FLETCHER: Yeah.

10 JUSTICE SOTOMAYOR: Could you address  
11 that part of -- of the Justice's stated views?

12 MR. FLETCHER: I'm happy to. Justice  
13 Thomas, you have addressed this at length in  
14 Axon and in other writings. You know, we -- the  
15 place where I think we would depart from you is  
16 we think that the Court's cases going back all  
17 the way to Murray's Lessee stand for the  
18 proposition that it can be a matter of public  
19 rights within -- for purposes of Article III  
20 even if private property was involved. Murray's  
21 Lessee, after all, was taking someone's property  
22 in order to satisfy a debt to the government.  
23 Same thing in Stranahan. The same time thing in  
24 Atlas Roofing.

25 What we think makes it a matter of



1 public rights and means that it does not offend  
2 the separation of powers to assign its  
3 enforcement and initial adjudication to  
4 executive branch officials is that it's a  
5 classic exercise of executive power to enforce  
6 federal law by applying the law to the facts in  
7 a particular case and by imposing the  
8 consequences that are specified by law.

9 CHIEF JUSTICE ROBERTS: Could -- could  
10 I ask you just a couple of examples and see  
11 where it falls under your definition?

12 The federal government in association  
13 with the states built the interstate highway  
14 system, an enormous benefit to members of the  
15 public. Could the government decide that  
16 accidents interfere with what they were trying  
17 to accomplish in the highway system and create  
18 an agency to hear and adjudicate who's liable,  
19 responsible, and how much for accidents on the  
20 highway system? No court, no jury?

21 MR. FLETCHER: No, Mr. Chief Justice,  
22 not under the strand of cases that we're relying  
23 on here. I take the hypothetical to be could  
24 Congress replace the tort system that would  
25 adjudicate liability between individuals, the

1 party involved in a crash, take that --

2 CHIEF JUSTICE ROBERTS: Well, only --  
3 only on a system where they gave the benefit  
4 which those people that have the accidents are  
5 taking advantage of. I understood that to be  
6 part of the aspect of the public rights  
7 doctrine.

8 MR. FLETCHER: I think there are  
9 strands of the Court's public rights cases that  
10 talk about government benefits. I think usually  
11 the sense in which that's relevant and the only  
12 sense it would be relevant to the argument we're  
13 making here is when it's the government itself.  
14 It's -- public rights are matters between the  
15 government and the public. Sometimes that's --

16 CHIEF JUSTICE ROBERTS: So -- so what  
17 about healthcare? The government's involved in  
18 the healthcare sector. Could an agency  
19 determine that the cost of medical malpractice  
20 claims throughout healthcare, not just the  
21 particular aspect which the government's  
22 participating in, interferes with what they're  
23 trying to accomplish in the healthcare system,  
24 and so the subject of medical malpractice will  
25 be handled by a government agency, an expert

1     agency, to reduce the costs of the benefit of  
2     healthcare that the government provides? No  
3     court, no jury?

4             MR. FLETCHER: Not if we're talking  
5     about adjudicating matters of private rights.  
6     In Crowell's terms, the liability of one person  
7     --

8             CHIEF JUSTICE ROBERTS: Well, that's  
9     --

10            MR. FLETCHER: -- to another under the  
11     law is defined.

12            CHIEF JUSTICE ROBERTS: Yeah.

13            MR. FLETCHER: Potentially yes if  
14     we're talking about taking an area of law,  
15     concluding that common law remedies aren't  
16     sufficient, erecting a structure of federal  
17     regulations, and empowering an agency to enforce  
18     it. That's the OSH Act in Atlas Roofing.  
19     That's the securities laws at issue here.

20            CHIEF JUSTICE ROBERTS: Well, if I  
21     could just interrupt because you said no because  
22     it involves private rights. Well, what is the  
23     intersection or distinction? I mean, I could  
24     see -- it seems to me that it involves public  
25     benefits as well, I mean, the -- the provision

1 of healthcare and people take advantage of it,  
2 and this is a government decision that they want  
3 that public benefit to be available more  
4 economically, more efficiently. Yes, it has  
5 private rights in it. The people who are  
6 injured have a right, I guess, to pursue the  
7 people who injured them. But it's also a public  
8 right.

9 And -- and how are we supposed to  
10 decide which of those two parameters prevails?

11 MR. FLETCHER: So I think you can  
12 acknowledge, as the Court has done before, that  
13 there are fuzzy boundaries at the outer edges of  
14 some parts of the public rights doctrine. But I  
15 think the difference between those cases and  
16 this one is that in this case, we're talking  
17 about what we had in Atlas, which is a federal  
18 agency that's charged with enforcing rights  
19 enacted for the benefit of the public, in  
20 Justice Scalia's words in *Granfinanciera*, rights  
21 held by the public, and that --

22 CHIEF JUSTICE ROBERTS: Well, but, on  
23 the private side, I guess they would be normal  
24 fraud claims, right? I mean, the -- the  
25 securities claims regulated by the SEC look a

1 lot like claims that could be brought in private  
2 -- in court before a jury for fraud.

3 MR. FLETCHER: So there's some analogy  
4 there. There was also some analogy in Atlas  
5 Roofing, you know, the OSH Act. The claims that  
6 were brought there looked in some ways like  
7 negligence or wrongful death claims for  
8 workplace hazards that had long been brought in  
9 common law.

10 The difference is that there and here,  
11 Congress has enacted a federal regulatory regime  
12 that doesn't just federalize securities fraud or  
13 federalize negligence in workplaces the way some  
14 of Your Honor's hypotheticals were positing, but  
15 it erects a comprehensive federal scheme that  
16 goes well beyond common law fraud.

17 And it differs in sort of every  
18 particular. It's --

19 JUSTICE KAVANAUGH: Let's --

20 JUSTICE JACKSON: And it's not even  
21 purporting to be common law fraud. I mean, I --  
22 I understood that the Seventh -- the -- the  
23 Seventh Amendment protects private rights of  
24 action that the common law has created and is  
25 given to private parties to enforce.

1                   And when you have that situation, when  
2     you have a common law fraud claim, that's what  
3     you're trying to bring, you have the right under  
4     the Seventh Amendment to bring that in an  
5     Article III court with all of the protections  
6     that exist, including a jury trial.

7                   But, when Congress has created a new  
8     right, a new duty, you know, the -- the duty  
9     that exists under the Securities and Exchange  
10    Act that -- that is created by law, I thought  
11    Atlas Roofing was saying you're not worried  
12    about stealing a common law claim and putting it  
13    into a non-Article III tribunal, that that's  
14    really the issue.

15                  So, when we're looking for, you know,  
16    this circumstance, we're trying to ask at the  
17    beginning, is there a common law claim or right  
18    that is being implicated here?

19                  MR. FLETCHER: So I think that's -- I  
20    mostly agree with that. I would supplement it a  
21    little bit. I think it's not just the presence  
22    of a statute that's important. But, if we're  
23    talking about a case in court between private  
24    parties, the Seventh Amendment can apply to a  
25    case involving legal claims even if they arise

1 under a statute rather than under the common  
2 law.

3 The critical point is that the Seventh  
4 Amendment right to trial by jury has always  
5 depended on the nature of the forum and the  
6 nature of the cause of action. By its terms, it  
7 applies to suits at common law.

8 JUSTICE GORSUCH: And, Mr. Fletcher --

9 JUSTICE KAVANAUGH: So your whole --

10 JUSTICE GORSUCH: -- if we -- oh, I'm  
11 sorry. Please.

12 JUSTICE KAVANAUGH: Go ahead.

13 JUSTICE GORSUCH: Well, we'd agree  
14 that the right to trial by jury, whether it's  
15 criminal or civil, is a very important  
16 foundational freedom in -- in American society  
17 and a check on all branches of government,  
18 wouldn't we?

19 MR. FLETCHER: We do.

20 JUSTICE GORSUCH: Okay. And we'd  
21 agree that if the government sought the same  
22 penalties in a criminal proceeding, a jury trial  
23 right would attach?

24 MR. FLETCHER: I -- I think that  
25 depends, Justice Gorsuch. I think, on fines,

1     this is a point that Atlas made.  Actually,  
2     there, government can seek fines and it doesn't  
3     trigger the Sixth Amendment jury trial right.

4                 JUSTICE GORSUCH:  Penalties?  
5     Penalties?

6                 MR. FLETCHER:  Criminal fines.

7                 JUSTICE GORSUCH:  Criminal penalties,  
8     you -- you think the jury trial right would  
9     attach?  A felony, you know, this is a felony  
10    fraud and the guy can go to jail and he can get  
11    penalties, you think no jury?

12                MR. FLETCHER:  I -- I -- I'm not  
13    saying that there's no limits on that.  I'm just  
14    saying a point that the Court made in Atlas was  
15    that for small fines, those pick up --

16                JUSTICE GORSUCH:  Oh, small fines?

17                MR. FLETCHER:  Yes.

18                JUSTICE GORSUCH:  Okay.  All right.  
19    But -- but, here, we're not talking about a  
20    small fine, though.

21                MR. FLETCHER:  Yeah, so -- and, again,  
22    I don't want to fight too much on this.  I agree  
23    --

24                JUSTICE GORSUCH:  So we'd agree --

25                MR. FLETCHER:  -- there would be a



1 jury required in a criminal case.

2 JUSTICE GORSUCH: -- we --

3 MR. FLETCHER: Yes.

4 JUSTICE GORSUCH: In -- in this  
5 criminal -- if this were a criminal case, it  
6 would have a jury, right?

7 MR. FLETCHER: I -- I think that's  
8 very -- I don't know honestly where the line  
9 would fall, but I -- I'm not going to disagree  
10 that criminal cases involve juries, and if this  
11 were civilly brought in a court, it would  
12 require a jury. I concede that as well.

13 JUSTICE GORSUCH: Okay. And -- well,  
14 let's -- let's come to that in a second. So  
15 returning to the Chief Justice's questions about  
16 administrative regimes, I've got another one for  
17 you.

18 Let's say the government revived the  
19 Sedition Act and decided that, you know, it's  
20 really important to have a federal agency who  
21 could bring penalties for defamation against the  
22 government.

23 Jury trial, no jury trial?

24 MR. FLETCHER: Unconstitutional on  
25 First Amendment grounds for sure.

1 (Laughter.)

2 JUSTICE GORSUCH: Forget about the  
3 First Amendment. You -- too easy. We're  
4 talking about the Seventh Amendment and the  
5 right to a jury trial, and that -- that is an  
6 important and ancient right too.

7 MR. FLETCHER: Yeah. And I'm -- what  
8 I'm saying and the reason I responded that, I  
9 realize that's not the point of the question,  
10 but I think the included force --

11 JUSTICE GORSUCH: Then -- then -- then  
12 let's answer the question.

13 MR. FLETCHER: Yeah. So, if it's a --

14 JUSTICE GORSUCH: Seventh Amendment  
15 right or no Seventh Amendment?

16 MR. FLETCHER: -- otherwise valid  
17 federal regulatory statute --

18 JUSTICE GORSUCH: Yep.

19 MR. FLETCHER: -- being enforced by  
20 the government --

21 JUSTICE GORSUCH: Yep.

22 MR. FLETCHER: -- pursuant to its  
23 sovereign powers, that's Atlas Roofing in this  
24 case.

25 JUSTICE GORSUCH: No --

1                   MR. FLETCHER: Lots of other  
2 constitutional problems.

3                   JUSTICE GORSUCH: -- no jury trial  
4 right. I think that has to be the implication  
5 of your argument.

6                   I want to talk to you for just a  
7 minute about how you deal with Tull and  
8 Granfinanciera. We agree that Tull found that  
9 some civil penalties under the Clean Water Act  
10 imposed by the government do trigger the Seventh  
11 Amendment, right?

12                  MR. FLETCHER: When heard in court.

13                  JUSTICE GORSUCH: When heard in court.  
14 And that's the key distinction as far as you're  
15 concerned?

16                  MR. FLETCHER: Yes.

17                  JUSTICE GORSUCH: What if the  
18 government tomorrow decided, well, we don't like  
19 those jury trial that come with that, we're --  
20 we're going to -- we're going to effectively  
21 overrule Tull by moving those to administrative  
22 proceedings.

23                  Then the Seventh Amendment would  
24 disappear on your account, wouldn't it?

25                  MR. FLETCHER: Yes, but that's Atlas

1 too. And the Court recognized and looked at all  
2 of the history and the importance of the Seventh  
3 Amendment but said it's always been tied to the  
4 nature of the forum. There have always been  
5 circumstances where important rights get  
6 adjudicated without a jury in admiralty record  
7 --

8 JUSTICE GORSUCH: I -- I understand  
9 that.

10 MR. FLETCHER: -- proceedings.

11 JUSTICE GORSUCH: I think the key --

12 MR. FLETCHER: And this is just that.

13 JUSTICE GORSUCH: -- the key part of  
14 that answer is yes, that that would overrule the  
15 preexisting Seventh Amendment right this Court  
16 recognized in Tull.

17 MR. FLETCHER: I disagree that it  
18 would overrule that right respectfully, Justice  
19 Gorsuch. I think the right in Tull --

20 JUSTICE GORSUCH: It would evaporate  
21 it?

22 MR. FLETCHER: No, not --

23 JUSTICE GORSUCH: It would dissipate  
24 it? What verb would you prefer?

25 MR. FLETCHER: No. The Seventh

1 Amendment right that the Court recognized in  
2 Tull is the one in the Seventh Amendment, which  
3 is a right in suits at common law.

4 JUSTICE GORSUCH: Okay.

5 MR. FLETCHER: It's an administrative  
6 proceeding. It's not a suit at common law.

7 JUSTICE GORSUCH: Okay. So let's talk  
8 about Granfinanciera, which applied Tull's test  
9 in a non-Article III tribunal, right?

10 MR. FLETCHER: Yes.

11 JUSTICE GORSUCH: Okay. And it said  
12 the Seventh Amendment applied there in a  
13 non-Article III tribunal.

14 MR. FLETCHER: Yes.

15 JUSTICE GORSUCH: Okay. I understand  
16 that your distinction there is that it happened  
17 to be between two private parties.

18 MR. FLETCHER: Not just our  
19 distinction, the Court's distinction in  
20 Granfinanciera repeatedly.

21 JUSTICE GORSUCH: No, no, but between  
22 this -- your argument between this case and that  
23 case is that's the distinction. The relevant  
24 distinction is private parties, right?

25 MR. FLETCHER: Which was core to

1 Granfinanciera's reasoning --

2 JUSTICE GORSUCH: That's all right.

3 Fine.

4 MR. FLETCHER: -- is what I want to  
5 say.

6 JUSTICE GORSUCH: But now let's say  
7 that -- that the government brought a fraudulent  
8 conveyance argument instead of a private party.  
9 Then the Seventh Amendment right would again, on  
10 your account, I think, dissipate, disappear,  
11 whatever verb you want to use?

12 MR. FLETCHER: So I -- I'm not as sure  
13 about that, Justice Gorsuch. I think the  
14 principle in Atlas Roofing and the one we're  
15 relying on here is government enforcement in its  
16 sovereign capacity.

17 If you're talking about government in  
18 its proprietary capacity bringing a fraudulent  
19 conveyance claim as an ordinary participant in  
20 bankruptcy --

21 JUSTICE GORSUCH: Well, they'll create  
22 some statute much like the one we have here that  
23 looks a lot like fraud but a little bit  
24 different in sovereign capacity.

25 MR. FLETCHER: Yeah. So there are a

1 lot of statutes that say that in those  
2 circumstances, the government can proceed in  
3 administrative proceedings without a jury trial  
4 right, yes.

5 JUSTICE GORSUCH: Thank you.

6 JUSTICE SOTOMAYOR: Can we go --

7 JUSTICE KAVANAUGH: What would --

8 JUSTICE SOTOMAYOR: -- to that  
9 question? Justice Gorsuch called it small  
10 differences. There are big differences between  
11 a common law fraud claim and a claim under the  
12 SEC, correct?

13 MR. FLETCHER: Yes.

14 JUSTICE SOTOMAYOR: Would you just  
15 break them down?

16 MR. FLETCHER: Sure. So the critical  
17 one for purposes of separation of powers is that  
18 when the Securities and Exchange Commission  
19 finds facts, conducts adjudications, imposes the  
20 consequences required by law, it is executing  
21 the laws in a classic Article II sense.

22 Murray's Lessee, City of Arlington,  
23 this Court has long recognized that its  
24 executive power to apply the law to the facts  
25 and impose consequences prescribed by law in

1 particular cases.

2           So, from the question of asking has  
3 Congress tried to assign an Article III power to  
4 some entity that's not an Article III, we think  
5 it hasn't done that when it's authorized an  
6 agency to find facts and impose consequences in  
7 enforcing the law.

8           As to specific distinctions on  
9 securities, so it's not it's just it's a  
10 different enforcer, it's also that the  
11 requirements look different. Congress didn't  
12 just federalize the law of fraud. It adopted a  
13 comprehensive regulatory regime with lots of  
14 prophylactic registration, disclosure, and other  
15 requirements totally unknown to the common law,  
16 provided for enforcement by the public, not by  
17 private parties, and provided different  
18 remedies, including not just things like  
19 disgorgement or damages but bars on  
20 participation in the industry, deregistration of  
21 securities, civil penalties. None of that was  
22 found in the common law.

23           JUSTICE KAVANAUGH: Mr. Fletcher --

24           JUSTICE SOTOMAYOR: The remedies --

25           JUSTICE KAGAN: Aren't there also



1 different elements --

2 JUSTICE SOTOMAYOR: I'm sorry. If I  
3 may finish.

4 The remedies were different, but so  
5 are the -- the elements of the fraud.

6 MR. FLETCHER: The elements are  
7 different as well, exactly. Even if you're --

8 JUSTICE SOTOMAYOR: It's actually not  
9 even fraud in all circumstances.

10 MR. FLETCHER: That's the point I was  
11 trying to make when I said that it's not just  
12 fraud cases. It's also prophylactic disclosure  
13 and other requirements that don't look anything  
14 like fraud.

15 And then, Justice Kagan, I think this  
16 is where you were going, even if we're talking  
17 about the subset of SEC cases that do look more  
18 like common law fraud, the elements are  
19 different precisely because it's not trying to  
20 right a private wrong. We're trying to  
21 vindicate the public's right to fair and honest  
22 markets.

23 And so we don't require a showing of  
24 reliance. We don't require a showing of damage  
25 to private parties. As this Court said in

1 Kokesh, what we're looking for --

2 JUSTICE ALITO: Well, what if the  
3 statute did require that? Would your argument  
4 be different?

5 MR. FLETCHER: So I don't -- parts of  
6 my argument, I think I wouldn't be able to rely  
7 on those distinctions. I think my fundamental  
8 argument would not change because we view the  
9 critical distinction as -- and the one relevant  
10 to separation of powers as being that  
11 enforcement by the executive.

12 JUSTICE ALITO: Well, as to the  
13 elements of -- of reliance, it doesn't make  
14 sense to say that the Seventh Amendment provides  
15 stronger protection when it is easier for the --  
16 the -- the prosecuting party to prove a claim  
17 than otherwise?

18 MR. FLETCHER: I don't think that's a  
19 relevant difference for Seventh Amendment  
20 purposes. I think the relevant difference --

21 JUSTICE ALITO: I thought you were  
22 saying that that was a difference.

23 MR. FLETCHER: No, I'm saying that our  
24 --

25 JUSTICE ALITO: There are elements of

1 common law fraud that are omitted under this --  
2 under these circumstances.

3 MR. FLETCHER: I took the question,  
4 the thrust of the question to be are we  
5 concerned that there's something, some sort of  
6 circumvention going on. Has Congress taken  
7 common law fraud and handed it from the courts  
8 to an agency.

9 The -- I think the constitutionally  
10 relevant distinction in our view is that this is  
11 something that has been assigned to a federal  
12 agency to enforce --

13 JUSTICE KAVANAUGH: Mr. Fletcher,  
14 your -- your whole argument on this civil  
15 penalties point seems to depend on Atlas  
16 Roofing. You've mentioned it already probably  
17 10 times.

18 Atlas Roofing, the other side says,  
19 has been severely undermined by later cases,  
20 such as Tull and Granfinanciera. Justice White,  
21 as you know, suggested parts of Atlas Roofing  
22 had been overruled in his dissent in the latter  
23 case.

24 And it does seem odd from a  
25 constitutional perspective to say that a private

1 suit triggers the Article III right to a federal  
2 court and a jury, a private suit against you for  
3 money, but a government suit against you for  
4 money is somehow exempt from those Article III  
5 and Seventh Amendment and due process  
6 requirements simply because the government  
7 attaches a different label, the public rights  
8 label to it.

9 So I think that's a strong argument on  
10 the other side. I wanted you to respond to  
11 that.

12 MR. FLETCHER: Yeah. There were  
13 several things packed in there. I'll see if I  
14 can get to all of them.

15 So, first of all, on the notion that  
16 we're relying solely on Atlas, Atlas obviously  
17 squarely considered this question, considered a  
18 lot of the same historical evidence, and  
19 couldn't have been clearer about what it was  
20 holding, but I don't want to suggest that that's  
21 all that we have.

22 You know, Atlas itself is relying on a  
23 line of decisions that go back to Helvering  
24 versus Mitchell, to the two Elting cases, to  
25 Stranahan from 1909, and even before that, all

1 of which stand for the same proposition that  
2 civil penalties in government enforcement  
3 actions are permissible, consistent with Article  
4 III and the Seventh Amendment.

5 So, as to the question whether the  
6 Court has backed away from that, I think exactly  
7 the opposite is true. So Tull is about  
8 government proceedings in court, and it makes  
9 clear that its holding applies in court and  
10 doesn't extend to administrative proceedings.

11 Granfinanciera and other cases have  
12 addressed a sort of different and much more  
13 contested question about when we're dealing with  
14 liability between two private parties, a  
15 fraudulent conveyance action there, how -- when  
16 can Congress take that and assign that to  
17 non-Article III courts.

18 JUSTICE KAVANAUGH: And what sense  
19 does it make to say the full constitutional  
20 protections apply when a private party is suing  
21 you, but we're going to discard those core  
22 constitutional historic protections when the  
23 government comes at you for the same money?

24 MR. FLETCHER: Yeah. So the plurality  
25 in Northern Pipeline, which I think, you know,

1     also recognized exactly this issue, sort of  
2     acknowledged that concern and said the reason is  
3     that the Article III question is grounded in the  
4     separation of powers. We're asking, are we  
5     concerned about Congress taking away the  
6     judiciary's power? And that's not -- that is a  
7     concern when you have disputes between private  
8     parties here today.

9             JUSTICE KAVANAUGH: Well, what about  
10    individual liberty? The purpose of the  
11    separation of powers is to protect individual  
12    liberty. And your individual liberty, it would  
13    seem, is even more or at least equally affected  
14    when the government is coming after you than  
15    another private party.

16            MR. FLETCHER: So I agree with that,  
17    Justice Kavanaugh. And I think the Due Process  
18    Clause certainly has something to say here. In  
19    cases like Atlas Roofing and more recently in  
20    Oil States, the Court has emphasized that  
21    judicial review of agency action may well be  
22    required.

23            I think our point is just that as a  
24    separation-of-powers matter, as a historical  
25    matter, it's permissible for Congress to give

1 adjudications to executive officials, that can  
2 be executive power, and that Congress has a lot  
3 of flexibility in deciding how to provide  
4 judicial review.

5 JUSTICE JACKSON: And isn't that what  
6 causes --

7 JUSTICE BARRETT: Mr. Fletcher, I have  
8 a question about Atlas Roofing, and maybe you  
9 can help me because I'm having a hard time  
10 figuring out the logic of it.

11 So Atlas Roofing says this: The  
12 government can commit the enforcement of  
13 statutes and the imposition of collection -- and  
14 collection of funds to the judiciary, in which  
15 case a jury trial would be required. But the  
16 United States can also validly opt for  
17 administrative enforcement without jury trials.

18 So I take that to mean that it's  
19 completely up to the forum, so the right to a  
20 jury trial would --

21 MR. FLETCHER: Right.

22 JUSTICE BARRETT: -- depend on the  
23 forum --

24 MR. FLETCHER: Right.

25 JUSTICE BARRETT: -- rather than the

1 nature of the action, whether the action is a  
2 private right or a public right.

3 How can that be?

4 MR. FLETCHER: So I -- I -- I think  
5 the answer to that is that the Seventh Amendment  
6 depends on the forum. That's the text and  
7 tradition of the Seventh Amendment. It's suits  
8 at common law. So it never applied in equity.  
9 We also don't think it applies in administrative  
10 proceedings.

11 But there's an important check on when  
12 Congress can assign matters to administrative  
13 proceedings, and that's the public  
14 rights/private rights distinction. That comes  
15 from Article III.

16 JUSTICE BARRETT: But it seems to me  
17 that what Atlas Roofing is saying here is that  
18 the public rights/private rights, just this part  
19 of it, because it seems to me --

20 MR. FLETCHER: Yeah.

21 JUSTICE BARRETT: -- that part of your  
22 argument depends on reading Atlas Roofing for  
23 all -- all that it's worth. I agree Atlas  
24 Roofing is a good case for you. But it seems to  
25 me that that part that I read and part of the



1 premise of Atlas Roofing really doesn't depend  
2 on the private rights/public rights; it really  
3 kind of depends on the forum.

4 And it's obviously true, right, that  
5 if you're in front of an agency, you're not  
6 entitled to a jury trial. So that's -- that's  
7 the whole question.

8 MR. FLETCHER: Yeah. It --

9 JUSTICE BARRETT: So it seems to me if  
10 you have an entitlement to a jury if you're in  
11 federal court, I don't understand then how you  
12 not have that right, how it can go to an agency.

13 MR. FLETCHER: So we look at the  
14 question the way the Court did most recently in  
15 Oil States, which is consistent with Atlas  
16 Roofing. We think the first question is, is  
17 this a matter that can be assigned to an agency?  
18 And that's governed by the public rights --

19 JUSTICE BARRETT: Okay.

20 MR. FLETCHER: -- question under  
21 Article III, right? And if the answer to that  
22 question is yes, then the Seventh Amendment  
23 doesn't impose additional constraints because,  
24 by its terms and by tradition, the Seventh  
25 Amendment doesn't apply in --

1 JUSTICE BARRETT: And why would you  
2 have those rights if it's -- if it -- if the  
3 government chooses to bring the action in the  
4 court, why would you have those rights? Because  
5 I take it what Atlas Roofing is there -- what  
6 Atlas Roofing is saying there is that if you  
7 have the exact same action, and let's assume  
8 it's public rights, that you could somehow have  
9 a right to a jury trial if it's in a court.

10 MR. FLETCHER: Right. And I think the  
11 difference is, if it's in a court, the Seventh  
12 Amendment applies by its terms. If it's in --  
13 permissibly assigned to an administrative  
14 agency, the Seventh Amendment doesn't apply.

15 JUSTICE BARRETT: But why? It doesn't  
16 apply to everything.

17 JUSTICE KAGAN: Is that because the  
18 Seventh Amendment says suits? Is that why?

19 MR. FLETCHER: That -- that's part of  
20 it. I mean, I think that's very strong textual  
21 evidence. That's also the longstanding  
22 historical understanding and the way the Court  
23 has always approached it.

24 JUSTICE KAGAN: I mean, it's -- it's a  
25 really interesting question that Justice Barrett

1 raises because I think it appeals to this  
2 intuition, like, we know jury rights are very  
3 important, and everybody agrees with that. And  
4 the idea that you would have it in one place and  
5 not have it in another place, well, why is that?

6 But I'm taking you to say that we've  
7 said that many times over, that the only  
8 relevant question here is the Article III  
9 question, that once the Article III question is  
10 decided in favor of allowing the proceeding to  
11 go forward in an agency, there is no independent  
12 Seventh Amendment question.

13 And I guess the question is, well, why  
14 shouldn't there be? Were we right to have said  
15 that --

16 MR. FLETCHER: Yeah.

17 JUSTICE KAGAN: -- I think four or  
18 five times?

19 MR. FLETCHER: At least.

20 JUSTICE BARRETT: But that's actually  
21 not quite my question because, in Atlas Roofing,  
22 it seemed to say -- I mean, I -- I -- I agree  
23 that the Seventh Amendment and then the  
24 separation of powers under the Article III line  
25 of cases reinforce each other in this respect,

1 but then why in Atlas Roofing is it assuming  
2 that the exact same suit would trigger a right  
3 to a jury trial in a court but not -- but could  
4 simultaneously be assigned to an agency?  
5 Because I take that to be the exact same thing.

6 I mean, I take the Court really to  
7 kind of be saying there if the OSH Act -- if --  
8 if -- if the agency had decided to bring it in a  
9 court, that it would have been triggered.

10 MR. FLETCHER: Yeah.

11 JUSTICE BARRETT: And, obviously, it's  
12 not true that everything that's brought in a  
13 court triggers the right to a jury trial. It's  
14 only those that were suits at common law.

15 MR. FLETCHER: Right.

16 JUSTICE BARRETT: Right? So I -- I --  
17 I guess I just don't understand the logic here  
18 but for a different reason than Justice Kagan's  
19 saying at least I -- I think.

20 MR. FLETCHER: So I apologize, Justice  
21 Barrett. I may -- I may not be completely  
22 following. I think it's that only if it is in  
23 court do you ask the Seventh Amendment question,  
24 which, as you say, sometimes the answer is yes,  
25 you have a jury trial right; sometimes the

1 answer is no, you don't have a jury trial right.

2 Our view is that the text of the  
3 Seventh Amendment tells you you don't even ask  
4 that question if you're in front of a different  
5 tribunal, like the --

6 JUSTICE JACKSON: But, Mr. Fletcher, I  
7 don't understand, like Justice Barrett, why the  
8 forum is leading this issue. And I know your  
9 time is up.

10 Mr. Chief Justice, do you want me to  
11 wait until --

12 CHIEF JUSTICE ROBERTS: Why don't you  
13 finish your question and then --

14 JUSTICE JACKSON: Okay.

15 CHIEF JUSTICE ROBERTS: -- we'll move  
16 on to --

17 JUSTICE JACKSON: I don't understand  
18 why the forum is the first question. I thought  
19 that the first question was, what is the nature  
20 of the claim? In other words, is this a common  
21 law action?

22 The concern that you mentioned many  
23 times was is the law of fraud being federalized.  
24 And when the law of fraud is being federalized,  
25 the Seventh Amendment is implicated because what

1 the Seventh Amendment is doing is protecting the  
2 right of a person who has a common law fraud  
3 claim to bring it in federal court and not have  
4 it directed into some forum where they don't get  
5 a jury trial.

6 So it seems to me that the initial  
7 question is, what is the right or the duty or  
8 whatever that is being established? And so  
9 Atlas Roofing begins by acknowledging that the  
10 Act created a new statutory duty, right? So,  
11 when we have this new statutory duty, it's not a  
12 common law duty, the question is, can this new  
13 duty be directed to an administrative tribunal  
14 without Seventh Amendment protections or not?

15 And Atlas Roofing says of course  
16 because it's a new duty. It's not -- we're not  
17 worried that they are stealing the common law  
18 claims and putting it into this situation. So,  
19 for me, the answer is not starting with, where  
20 is this taking place? It's starting with, what  
21 is the claim or the duty at issue? And if it's  
22 a new statutory duty, says Atlas Roofing, we've  
23 held forever that Congress can assign it to the  
24 court, Congress can assign it to the  
25 administrative agency. The Seventh Amendment is

1     isn't implicated because we're not talking about  
2     a common law suit.

3                 MR. FLETCHER:   Justice Barrett --

4                 CHIEF JUSTICE ROBERTS:   Briefly,  
5     counsel.

6                 MR. FLETCHER:   -- Justice Jackson, I  
7     think the reason why the Court has looked at it  
8     differently is that Article III actually  
9     provides more protection.  It's not just  
10    concerned about protecting people's access to  
11    the courts in common law cases where there's a  
12    right to trial by jury.  It also protects the  
13    right to go to an Article III court if you have  
14    an equitable action of each party.

15                JUSTICE JACKSON:   Right.  But what  
16    about the Seventh Amendment?

17                MR. FLETCHER:   Right.

18                JUSTICE JACKSON:   Aren't we asking  
19    what the Seventh Amendment protects?

20                MR. FLETCHER:   And the point that I'm  
21    making is the point from Oil States and the  
22    Court's other cases, which is the Seventh  
23    Amendment is essentially downstream from Article  
24    III.  It applies -- it's a forum-dependent right  
25    by its terms, suits at common law.  If you have

1 something permissibly assigned to an  
2 administrative agency, you don't have a suit  
3 assigned at common law. And so, as the Court  
4 said at the end of its opinion in Oil States, if  
5 you've answered the Article III question first  
6 and it's permissibly in an agency, that resolves  
7 the Seventh Amendment question too.

8 I'm sorry, Chief Justice.

9 CHIEF JUSTICE ROBERTS: Thank -- thank  
10 you, counsel.

11 Just a couple of questions. Justice  
12 Kagan pointed out that what the Constitution  
13 says were suits at common law. And -- and I  
14 think that may be a better focus than a -- a --  
15 a concept that we've had a great deal of trouble  
16 with anyway of public -- public rights. And  
17 it's also what we said in -- in Stern, that the  
18 one thing you can't take away from the court,  
19 you know, suits made of the stuff of the  
20 traditional actions at common law tried by the  
21 courts at -- at West -- at Westminster.

22 But it can't be the case that it's a  
23 suit -- would be a suit at common law, it would  
24 have been tried at Westminster, but the  
25 government calls it something different, but



1     it's the same thing?

2                     I mean, that -- suits at common law  
3     would seem to be a significant constraint on  
4     what the government can take away from the  
5     courts and arrogate to its own employees as  
6     hearing examiners.

7                     MR. FLETCHER:   So, Mr. Chief Justice,  
8     I think those constraints exist, but I think the  
9     Court has located them correctly in Article III  
10    and the Due Process Clause, not just in the  
11    Seventh Amendment.

12                    And I think part of that is because  
13    those provisions actually provide more  
14    protection and more access to courts than the  
15    Seventh Amendment would because the Seventh  
16    Amendment is limited to suits at common law.

17                    CHIEF JUSTICE ROBERTS:   Thank you.  
18    And just one more question.

19                    Atlas Roofing is 50 -- 50 years old.  
20    And the extent of impact of government agencies  
21    on daily life today is enormously more  
22    significant than it was 50 years ago.   I mean,  
23    does that have any -- should that be a concern  
24    for us or a consideration when we're trying to  
25    consider what power the government has to take

1     away the jury trial right or, as an antecedent  
2     to that, to take away the right to go into  
3     court?

4                 I mean, the government is much more  
5     likely to affect you and proceed against you  
6     before one of its own agencies than in court,  
7     and that concern and that threat is far greater  
8     today than when Atlas Roofing was set up.

9                 And -- and as a general matter, it  
10    does seem to me to be curious that and unlike  
11    most constitutional rights that you have that  
12    right until the government decides that they  
13    don't want you to have it. That doesn't seem to  
14    me the way the Constitution normally works.

15                MR. FLETCHER: So let me start with  
16    the first question about changes since Atlas  
17    Roofing. I think it's true there are more  
18    agencies now than there were then. I don't  
19    think that changes the relevant constitutional  
20    principles. I think the one thing that it does  
21    highlight is the extent to which Congress has  
22    relied on Atlas Roofing.

23                You know, at that time, Congress --  
24    the Court said these are already very common  
25    practices. They have only become more so ever

1     since as Congress has relied extensively on this  
2     Court's holding that this is a permissible way  
3     to provide for the government to enforce the  
4     rights held by the public.

5             Now I take your point about questions  
6     of fairness and about the rights of individuals.  
7     Those are important considerations. I think  
8     the -- the only place I would differ from you is  
9     that we think those are best answered by the Due  
10    Process Clause, which speaks to the requirement  
11    of judicial review and by the provision of  
12    judicial review of the agency's actions at the  
13    back end.

14            And, finally, you asked about the sort  
15    of question about the forum and isn't it a  
16    little odd to think of a constitutional right  
17    that applies in some places and not in others.

18            And the point that I was trying to get  
19    at in response to Justice Barrett earlier is  
20    that that's always been a feature of the Seventh  
21    Amendment. At the founding, you could have had  
22    exactly the same sort of --

23            CHIEF JUSTICE ROBERTS: Well, that's  
24    right, but that wasn't my point that it could be  
25    in one place or another.

1           My point more was it could be in one  
2     place we have the protections of Article III  
3     against the government, or the government can  
4     decide we think we'll be better off deciding  
5     that in our own agency before our own employees.

6           That's not just one place or another.  
7     It seems to me that undermines the whole point  
8     of the constitutional protection in the first  
9     place.

10           MR. FLETCHER: So I -- I disagree, Mr.  
11     Chief Justice. I think that's something that  
12     Congress has long done, has provided for  
13     administrative adjudications first and judicial  
14     review later.

15           I think that's obviously subject to  
16     due process constraints, but when it is  
17     consistent with those constraints, and there's  
18     no challenge here that this scheme is not, then  
19     it is consistent with our tradition and -- and  
20     not just since Atlas Roofing, but really, you  
21     know, this was an established practice for more  
22     than a century before that as well.

23           CHIEF JUSTICE ROBERTS: Thank you.  
24           Justice Thomas?

25           JUSTICE THOMAS: Mr. Fletcher, would

1     you give us a brief definition, your definition  
2     of public rights?

3                 MR. FLETCHER:   Sure.   I think the --  
4     I'm not going to try to do it comprehensively  
5     because I think that there are some sort of  
6     contested questions that are not at issue in  
7     this case.

8                 For purposes of this case, we would  
9     just ask the Court to say what it said in Atlas  
10    Roofing, which is, when the government in its  
11    sovereign capacity is enforcing a federal  
12    statute, then it is enforcing public rights.

13                JUSTICE THOMAS:   So it's the nature of  
14    the government's enforcement?

15                MR. FLETCHER:   Right.   It is -- it is.  
16    I think I would put it maybe the way Justice  
17    Scalia did in Gran -- his Granfinanciera  
18    concurrence where he said it's are we enforcing  
19    rights held by the public.   That's the meaning  
20    of public rights.

21                JUSTICE THOMAS:   So how would you --  
22    how would property rights fit in that?   Those  
23    are usually considered private.

24                MR. FLETCHER:   Right.   And I  
25    understand the intuition that you have written

1     about and that some scholarship has written  
2     about that says the -- the public rights/private  
3     rights question should be are there private  
4     rights like property or liberty at stake on one  
5     side of the ledger.

6             And the reason why I think that can't  
7     be the way to ask the question is that in all of  
8     -- many of the Court's public rights cases going  
9     back to Murray's Lessee, there have been private  
10    property interests that would be affected.

11            There are administrative adjudications  
12    that happen all the time that affect property,  
13    that affect liberty in the immigration context,  
14    that affect very important interests of  
15    individuals that we still conceive of as public  
16    rights matters that can go to agencies in the  
17    first instance.

18            JUSTICE THOMAS:   Thank you.

19            CHIEF JUSTICE ROBERTS:   Justice Alito?

20            JUSTICE ALITO:   I wanted to follow up  
21    on a question asked by the Chief Justice and  
22    then a question asked by Justice Kavanaugh.

23            So the question asked by the Chief  
24    Justice concerns the textual argument that the  
25    Seventh Amendment doesn't apply here because

1       it's not a suit.

2                       Why is it not a suit?

3                       MR. FLETCHER: I think because a suit  
4       is traditionally understood to be a proceeding  
5       in court.

6                       JUSTICE ALITO: So, if something -- if  
7       a -- a claim at common law for which a party  
8       would have the right to a jury trial is simply  
9       transferred to some other tribunal, that makes  
10      it not a suit?

11                      MR. FLETCHER: When it's assigned to  
12      executive officers to find the facts and apply  
13      the law, that's not a suit. And that's  
14      something that's been happening since the  
15      founding, often very informally, and I think our  
16      point here is that Congress can provide  
17      trial-type procedures to make sure that that's  
18      more fair to parties and more accurate, but when  
19      it does that, it doesn't change the nature of  
20      the power.

21                      JUSTICE ALITO: Doesn't that seem  
22      like --

23                      MR. FLETCHER: It's still a right.

24                      JUSTICE ALITO: -- doesn't that seem  
25      like a pretty patent evasion of the Seventh

1 Amendment to say this protection which was  
2 regarded at the time of the adoption of the Bill  
3 of Rights as sufficiently important to merit  
4 inclusion in the Constitution can be nullified  
5 simply by changing the label that is attached to  
6 a tribunal?

7 MR. FLETCHER: And -- and the  
8 difference, Justice Alito, is that I don't think  
9 it's just changing the label. It is changing  
10 the nature of the power being exercised.

11 And I want to underscore again that I  
12 think it very well may be the case that there  
13 are constitutional rights that require some  
14 amount of judicial process. Our point is just  
15 that we think those are found in the Due Process  
16 Clause and not in the Seventh Amendment.

17 JUSTICE ALITO: What if the -- what if  
18 the -- the suit is not the -- the -- the  
19 adjudication, the dispute is not between the  
20 government and a private party but between two  
21 private parties, but it's before an agency.

22 Would you say that is still not a  
23 suit?

24 MR. FLETCHER: I think that is still  
25 not a suit, but Article III would have much more



1 to say about that, and it there imposes much  
2 greater constraints on Congress's ability to  
3 assign that sort of dispute between private  
4 parties to an agency in the first place.

5 JUSTICE ALITO: Well, I -- I don't  
6 understand why you keep shifting to Article III.  
7 I mean, the question before us is the Seventh  
8 Amendment, which speaks directly to the question  
9 of suits at common law and to a private right  
10 and to the right of a jury trial. Or I'll take  
11 out the private right part.

12 MR. FLETCHER: Yeah.

13 JUSTICE ALITO: It speaks to suits at  
14 common law and -- and the right to a jury trial.

15 MR. FLETCHER: Right. So the reason  
16 I'm focused on Article III is because the first  
17 answer to the Seventh Amendment is it's suits at  
18 common law. Proceedings in an agency aren't  
19 suits.

20 I take the force of your response,  
21 which is it seems odd to say that we can just  
22 take something away from a court and hand it to  
23 an agency, and I'm trying to respond to that by  
24 saying there is a constraint on that and an  
25 important one. It's Article III and the Due

1 Process Clause, just not the setting.

2 JUSTICE ALITO: Yeah. Well, Article  
3 III was in the Constitution in 1787, but when  
4 Congress and the states put the Seventh  
5 Amendment into the Constitution, they apparently  
6 thought that Article III wasn't going to provide  
7 sufficient protection.

8 Can we not infer that?

9 MR. FLETCHER: I -- I think you  
10 absolutely can. But we think you should  
11 continue to, as you have before, read the  
12 Seventh Amendment's protection by its terms,  
13 which is to -- to be focused on suits in court,  
14 suits at common law.

15 JUSTICE ALITO: All right. The -- the  
16 other question was one that Justice Kavanaugh  
17 asked and I want you to go back to it.

18 And -- and I want to -- I want you to  
19 talk about the theory behind the Seventh  
20 Amendment. You have -- you have arguments based  
21 on precedent. You have your -- your textual  
22 argument about suit. But I just want you to  
23 talk about the theory of the Seventh Amendment.

24 Isn't the theory of the Seventh  
25 Amendment that people in this country should

1 have protection against having their liberty or  
2 property taken away by officials who are  
3 answerable to a powerful executive that the jury  
4 should be set up as a buffer between what the --  
5 in that situation?

6 Isn't that the theory of it?

7 MR. FLETCHER: I -- I don't think,  
8 respectfully, Justice Alito, that's the primary  
9 theory behind the Seventh Amendment. That's --  
10 that's part of it sometimes.

11 But, as we explained, you know, the --  
12 the proponents of the Seventh Amendment  
13 identified a lot of concerns about checking  
14 judges, about providing protection in private  
15 suits, and, really, I think the most telling  
16 evidence that it wasn't concerned about  
17 government enforcement is that in five of the  
18 seven state ratifying conventions that proposed  
19 something like the Seventh Amendment, they  
20 limited it to suits between private parties or  
21 involving real property. So they would have  
22 excluded the government altogether.

23 JUSTICE ALITO: Well, I'm talking  
24 about the Seventh Amendment to the Constitution  
25 of the United States. Justice Kavanaugh's

1 question was what sense does it make to say you  
2 have this protection when you're being sued by a  
3 private party, whose resources are certainly  
4 going to be more limited than the resources of  
5 the federal government, but when the same thing  
6 happens to you and the party that's against you  
7 is the federal government, well, this right to a  
8 jury trial simply goes out the window.

9 Does that make sense?

10 MR. FLETCHER: I think it does because  
11 I don't think it's the same thing that happens.  
12 If it's truly the same thing, if the government  
13 is proceeding against you in court on the same  
14 basis as a private party, then that's Tull, and  
15 the jury trial right does attach.

16 But what is different about an  
17 administrative proceeding is that then we're in  
18 the world of Congress permissibly, in a way that  
19 it is permitted to do under the Constitution,  
20 assigning to executive officials the  
21 responsibility for finding facts and imposing  
22 consequences, which happens all the time every  
23 day.

24 JUSTICE ALITO: All right. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: Let's go back to  
3 that distinction you were drawing earlier. You  
4 said that Justice Thomas and I think Justice  
5 Alito are concentrating on the Respondents'  
6 interests. But I think that we haven't really  
7 concentrated on what -- how the difference  
8 between a private right and a public right  
9 exist. I understood a public right to be a  
10 right possessed by the sovereign.

11 MR. FLETCHER: Exactly.

12 JUSTICE SOTOMAYOR: And it's an  
13 interest that's not -- that's possessed by the  
14 sovereign, correct?

15 MR. FLETCHER: Exactly, yes.

16 JUSTICE SOTOMAYOR: And that's why  
17 that interest in this case is to protect the --

18 MR. FLETCHER: Integrity of the  
19 securities markets, yes.

20 JUSTICE SOTOMAYOR: And that would  
21 include actions that have nothing to do with  
22 fraud, like a failure to disclose, registration  
23 requirements, et cetera, et cetera. If you  
24 violate those, you pay a penalty for it.

25 MR. FLETCHER: Exactly right. And I

1 think that also points up why it would be very  
2 difficult if the Court were to try to go down my  
3 friend's road and to say that the Seventh  
4 Amendment or Article III depended on how closely  
5 analogous the agency's enforcement action was to  
6 some suit at common law or to common law fraud.  
7 I think that would require having to parse on  
8 almost a provision-by-provision of the  
9 securities or other laws or even on a  
10 case-by-case basis, and there's no real  
11 principled yardstick for asking how analogous is  
12 too analogous for those purposes.

13 JUSTICE SOTOMAYOR: Well, I mean,  
14 there's -- and you're absolutely right, from  
15 Murray's Lessee down to our INA case to  
16 everything else, we've permitted the public  
17 interest to be protected in an administrative  
18 proceeding, correct?

19 MR. FLETCHER: Correct. Yes.

20 JUSTICE SOTOMAYOR: Now I'm going to  
21 pose what I consider the hardest question. I  
22 see the remedies here as remedies that are not  
23 generally available in common law, whether it's  
24 being barred or -- from practice or from -- or  
25 other things like that.

1                   Penalties seem similar, but how about  
2     if it included restitution, meaning now we're  
3     going to pay the money to a private party?  
4     Would that pose a problem?

5                   MR. FLETCHER: I don't think it would.  
6     You know, first of all, in this case, there's a  
7     disgorgement remedy, and the SEC -- the money  
8     goes to the SEC in the first instance, but then  
9     the SEC has to --

10                  JUSTICE SOTOMAYOR: And I think  
11     disgorgement is always very different because  
12     that's more like a fine or -- or --

13                  MR. FLETCHER: Yeah. So our view is  
14     that even if part of the remedy that the  
15     government is securing for the public, for the  
16     sovereign in the name of vindicating the public  
17     interest then is later paid over to private  
18     parties, that's still a matter of public rights.

19                  And that's not new here. The two  
20     Elting cases from 1932 that we describe, the  
21     penalties were not just a civil monetary penalty  
22     enforced by administrative officials. Those  
23     were immigration cases about unlawfully bringing  
24     non-citizens to the country. And administrative  
25     officials also made people who violated those

1 laws refund the non-citizens' fare for the  
2 passage to the country.

3 So this idea that administrative  
4 penalties and -- permissibly enforced through --  
5 in a public rights way includes providing some  
6 relief to private individuals dates back at  
7 least that far.

8 JUSTICE SOTOMAYOR: All right. Thank  
9 you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: So, Mr. Fletcher, I  
12 think one of the oddities of this case is, if  
13 you look at the question presented and then you  
14 read Atlas Roofing, you wonder why this case is  
15 here, in other words, that Atlas Roofing simply  
16 resolves the issue.

17 But you suggested that Atlas Roofing  
18 was not a one-off in the sense that it had a  
19 real historical grounding. You said that in  
20 your introduction. And I wanted to give you an  
21 opportunity to explain how that's true.

22 But I also want you to go forward from  
23 Atlas Roofing because, of course, there are  
24 precedents that we have that have been eroded  
25 over time, that have been changed, that -- that



1 don't get a hundred percent of their value 50  
2 years later as they do the moment they were  
3 issued.

4 And I think some of the questions that  
5 you've been asked here, you know, are to the  
6 effect of, well, might that be true with Atlas  
7 Roofing either because we have some idea of  
8 first principles, true or constructed, or  
9 because we have some idea that subsequent  
10 precedents in some sense narrowed or weakened  
11 Atlas Roofing.

12 So go backwards for me. Go forwards  
13 for me.

14 MR. FLETCHER: And so let me start  
15 with backwards and then forwards.

16 Going backwards, Atlas Roofing  
17 grounded its decision in a long line of prior  
18 cases. I think the best one to look at if you  
19 were just going to pick one is Oceanic Steam  
20 Navigation versus Stranahan. It's an  
21 immigration case from 1909. Many of the same  
22 arguments are presented. A party was subject to  
23 a fine by administrative officials, and they  
24 came to court and they said, if you're going to  
25 impose a civil monetary penalty on me, you've

1 got to go to an Article III court with all of  
2 the protections that that entails. And the  
3 Court said in the line that I quoted in my  
4 introduction the understanding from the  
5 beginning has been that Congress can legislate,  
6 impose civil penalties, and have executive  
7 officials impose those penalties in the first  
8 instance.

9           That same thing is reflected in  
10 Passavant, which is a case from 1893, in the  
11 Elting cases from 1932, in Helvering versus  
12 Mitchell, and those aren't just, you know,  
13 pinpoints in the landscape. All of them are  
14 saying this is a thing that Congress has long  
15 done. It is a thing that commonly happens. So  
16 it's not just precedent. I think it's also  
17 practice of the government that this Court has  
18 often looked to as being very important in the  
19 separation of powers.

20           So, going forward both to what the  
21 Court has done so far and what some of the  
22 questions suggest that the Court might do, I  
23 don't think there's any way to read the Court's  
24 subsequent cases as retreating from Atlas  
25 Roofing. All of them that my friend relies on

1     dealt with the sort of more contested fringes of  
2     the public rights doctrine when you're talking  
3     about the liability between two private parties.  
4     That's Granfinanciera, Thomas, Schor, Stern  
5     versus Marshall. All of them are careful to  
6     carve out and say we're talking about this  
7     special zone of liability between two private  
8     parties --

9             JUSTICE KAGAN: Indeed, if I might  
10    just interrupt, I mean, when you started in your  
11    introduction and you said what the Court has  
12    often said, that this is a very complicated,  
13    difficult area, but the Court has often said  
14    that when it's faced cases involving two private  
15    parties in which their dispute is embedded in a  
16    federal statutory scheme, and those are the  
17    cases that we found complicated and difficult.

18            MR. FLETCHER: Exactly, and you have  
19    Justice Scalia, you know, in Granfinanciera  
20    saying I would limit the public rights doctrine  
21    to cases involving the government because he  
22    disagrees with where the Court had gone on cases  
23    involving private parties. But this piece, the  
24    strand that I'm relying on here, is really a  
25    through line that the Court has never

1     questioned.

2                     And when -- I think one of the  
3     questions suggested Justice White, who was in  
4     dissent in *Granfinanciera*, said the Court has  
5     overruled *Atlas Roofing*, that was because he  
6     read *Atlas Roofing* to speak to the private  
7     parties cases, which we don't think it did. And  
8     the Court didn't agree.

9                     JUSTICE KAGAN: He read *Atlas Roofing*  
10    to impose a ceiling, which the Court had said,  
11    no, it doesn't where also -- there are also  
12    public rights involved in some private/private  
13    cases.

14                    MR. FLETCHER: Right. Exactly. And  
15    -- and so then, if I could, let me just -- you  
16    asked about going forward and some of the  
17    questions that have been raised about first  
18    principles. We don't think for the reasons that  
19    I described that there's anything wrong with  
20    *Atlas Roofing* as a matter of first principles.  
21    You know, quite to the contrary, we think this  
22    is a separation-of-powers matter, and this  
23    strand of the public rights doctrine is a  
24    reflection of it being a core exercise of  
25    executive power sometimes to adjudicate matters

1 and apply the law to the facts and impose  
2 consequences. It's immigration, it's seizing  
3 goods, it's taxes, it's customs all throughout  
4 our history. It happens all the time.

5 And I think the concern that I have  
6 about trying to reexamine all of that at this  
7 late date is really the consequences it would  
8 have both jurisprudentially and practically.  
9 So, as a jurisprudential matter, you know, some  
10 of the scholarship that Justice Thomas has  
11 relied on in his very thoughtful separate  
12 writings on this question very much acknowledged  
13 that they are saying that administrative law has  
14 taken a wrong turn a hundred years ago and needs  
15 to be fundamentally re-imagined.

16 I think that's a heavy task for the  
17 Court to take on, and I think if you -- the --  
18 you were inclined to do it, you certainly  
19 shouldn't do it in a case like this one, where I  
20 don't understand my friends to have asked you to  
21 overrule even *Atlas*, much less all of the other  
22 cases, much less tried to make the showing that  
23 really grapples with all of the consequences.

24 JUSTICE KAGAN: And when the Chief  
25 Justice made the point that it's been 50 years

1 and things have changed and that administrative  
2 agencies are more powerful, well, so too in  
3 those a hundred years, I mean, our problems have  
4 only gotten more complicated and difficult.

5 And it's usually Congress that decides  
6 how to solve those problems and whether  
7 administrative agencies with the kind of  
8 expertise that they have are the appropriate way  
9 to solve those problems, not this Court, which  
10 decides, oh, well, we really only need common  
11 law suits to deal with securities regulation.

12 MR. FLETCHER: Exactly, Justice Kagan.  
13 And I think the growth of civil penalties in  
14 administrative proceedings in particular, a lot  
15 of that is traceable to a report from the  
16 Administrative Conference of the United States  
17 in the 1970s that said this is a practice that  
18 is, you know, on sound constitutional footing.  
19 Some agencies have long had it, but we think  
20 there would be real salutary benefits both to  
21 the regulated parties and to the agencies of  
22 giving them the authority to do this because it  
23 can be done more efficiently in administrative  
24 proceedings because often administrative  
25 penalties are a lesser sanction than some of the

1 penalties that were at stake there, like  
2 permanent debarment from an industry or  
3 revocation of a license or something like that.

4 And Congress has taken that ball,  
5 blessed by this Court in Atlas Roofing, and  
6 really run with it in a lot of other statutes  
7 since.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Gorsuch?

11 JUSTICE GORSUCH: So, Mr. Fletcher,  
12 with respect to your argument that Congress can  
13 move something from courts into agencies and the  
14 Seventh Amendment doesn't speak to that because  
15 it's not a suit, I think Noel Webster described  
16 a suit as any action or process for the recovery  
17 of a right or a claim before any tribunal, which  
18 would seem to be a problem. That's a pretty  
19 contemporaneous definition.

20 And then Justice Brennan in  
21 Granfinanciera I think addressed your argument  
22 pretty squarely when he said Congress cannot  
23 eliminate a party's Seventh Amendment right to a  
24 jury trial merely by relabeling the cause of  
25 action and placing jurisdiction in an

1 administrative agency.

2 Thoughts?

3 MR. FLETCHER: Yeah. So I -- I guess  
4 I think that's still inconsistent with what the  
5 Court has said in Granfinanciera.

6 JUSTICE GORSUCH: I just quoted from  
7 Granfinanciera.

8 MR. FLETCHER: I -- I'm sorry. I -- I  
9 misspoke. I don't think that's what the Court  
10 held in Granfinanciera. It's inconsistent with  
11 what the Court said.

12 JUSTICE GORSUCH: Are you saying I  
13 misread it, Mr. Fletcher?

14 MR. FLETCHER: No, Justice Gorsuch.  
15 I'm saying --

16 JUSTICE GORSUCH: You said -- you said  
17 that that's a purely taxonomic change.

18 MR. FLETCHER: Yes.

19 JUSTICE GORSUCH: And that that's not  
20 enough to render it no longer a suit for  
21 purposes of the Seventh Amendment, right?

22 MR. FLETCHER: Yes. I think, in  
23 context, Granfinanciera is talking about a  
24 proceeding that was in a bankruptcy court in the  
25 Article III setting. I think the Court's



1 subsequent cases, including Oil States, have  
2 said, if you're permissibly in an Article III  
3 tribunal, then the Seventh Amendment doesn't  
4 have independent work to do.

5 I apologize for misidentifying the  
6 case I was relying on.

7 JUSTICE GORSUCH: All right. But  
8 it -- it would seem strange. And we don't  
9 usually say the government can avoid a  
10 constitutional mandate merely by relabeling or  
11 moving things around. It's -- it's as much a  
12 violation to do something indirectly as it is  
13 directly we usually say, right?

14 MR. FLETCHER: In some cases, but,  
15 again, the Seventh Amendment has always been  
16 forum-dependent. And, Justice Gorsuch, I just  
17 think it would also be odd to say, if executive  
18 officials impose penalties or other consequences  
19 very informally in ways that don't look at all  
20 like a tribunal because it's just the Customs  
21 officer saying you owe this much duties, then  
22 that's --

23 JUSTICE GORSUCH: I'll get to -- I'll  
24 get to Customs in a second, but with respect to  
25 the growth that the Chief Justice and Justice

1 Kagan were talking about, this SE -- this is not  
2 your grandfather's SEC, right?

3 Penalties were not something that were  
4 part of Jim Landis's original design against  
5 private parties, let alone against all private  
6 persons, right?

7 MR. FLETCHER: That's right.

8 JUSTICE GORSUCH: That came in the 19  
9 -- started in 1984 and was limited to insider  
10 trading claims, and then it was expanded, and  
11 what is at issue before us is a 2010 amendment  
12 to the law, right?

13 MR. FLETCHER: Not quite. Both 2010  
14 and the 1990 --

15 JUSTICE GORSUCH: 1990.

16 MR. FLETCHER: -- amendment as well,  
17 but yes.

18 JUSTICE GORSUCH: The 1990 and the  
19 2010.

20 MR. FLETCHER: Yes.

21 JUSTICE GORSUCH: Yeah. So it's a  
22 relatively new thing, right?

23 MR. FLETCHER: For the SEC, yes, not  
24 for agencies writ large.

25 JUSTICE GORSUCH: I understand. And

1 I -- I went back and looked just to see, you  
2 know, what's the scope of -- of the problem  
3 here, you know, and I came up with -- my law  
4 clerk found that the ALJs in the SEC, there are  
5 a total of five of them. Is that about right?

6 MR. FLETCHER: I -- I think it may be  
7 three now, yes.

8 JUSTICE GORSUCH: May be three?

9 MR. FLETCHER: Yes.

10 JUSTICE GORSUCH: So we're not talking  
11 about a huge number of cases.

12 MR. FLETCHER: Again, for the SEC,  
13 yes. For the administrative -- the  
14 administration writ large, it's a huge number.

15 JUSTICE GORSUCH: Most -- most of the  
16 ALJs in -- work for places like Social Security  
17 Administration, right, which give benefits and  
18 we're not talking about penalties.

19 MR. FLETCHER: About 80 percent of  
20 them are at SSA.

21 JUSTICE GORSUCH: Yeah.

22 MR. FLETCHER: The rest of them are at  
23 other agencies, yes.

24 JUSTICE GORSUCH: Okay. And -- and  
25 then, with respect to history, your best

1 examples I think are on page 23 of your brief.

2 MR. FLETCHER: Twenty-two to 23, yeah.

3 JUSTICE GORSUCH: The Customs, right?

4 MR. FLETCHER: Yeah.

5 JUSTICE GORSUCH: Tax and immigration?

6 MR. FLETCHER: Yes.

7 JUSTICE GORSUCH: Okay. Those are the  
8 three areas you'd have us point to. Any others?

9 MR. FLETCHER: I mean, Atlas Roofing  
10 as well.

11 JUSTICE GORSUCH: Obviously.

12 MR. FLETCHER: Right. Couldn't leave  
13 it out. But, you know, I think also the  
14 reasoning of those cases is not tied to those  
15 particular exercises of power and, in fact, to  
16 the contrary.

17 In Stranahan, the challenger in that  
18 case said this is a power that only exists in  
19 tax and Customs cases. It shouldn't extend  
20 here. And the Court rejected that and said it's  
21 not that limited, it applies here too.

22 And then, in Atlas Roofing, the  
23 challenger said it's just Customs and tax and  
24 immigration, and again the Court said it's not  
25 so limited.

1 JUSTICE GORSUCH: Okay. Then, with  
2 respect to Tull and Granfinanciera and their  
3 impact, Justice White, for whom I have great  
4 fondness, thought that they were overruled,  
5 didn't he?

6 MR. FLETCHER: He did in part, but  
7 that was based on a different understanding of  
8 -- of the Atlas Roofing decision than the one  
9 the majority had.

10 JUSTICE GORSUCH: And then you  
11 referenced Justice Scalia and his -- his belief  
12 that there had to be the government involved in  
13 the case to render it a public right. He made  
14 clear he thought that was a minimum.

15 MR. FLETCHER: Yes.

16 JUSTICE GORSUCH: Right? That was not  
17 the test writ large, correct?

18 MR. FLETCHER: Yes. And it's not our  
19 test writ large either.

20 JUSTICE GORSUCH: And then we all  
21 agree Congress has a lot more problems on its  
22 plate today than it -- than it did a hundred  
23 years ago or even 50 years ago. But that  
24 doesn't mean that the constraints of the  
25 Constitution somehow evaporate, do they?

1 MR. FLETCHER: I agree.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Kavanaugh?

5 JUSTICE KAVANAUGH: You've been  
6 resisting talking about the Seventh Amendment,  
7 saying that doesn't apply because it's not a --  
8 it only applies to suits in court and said we  
9 should talk about Article III and the Due  
10 Process Clause. So I'm going to take you up on  
11 that.

12 MR. FLETCHER: Great.

13 JUSTICE KAVANAUGH: On the public  
14 rights definition, because that seems to be the  
15 key line for Article III, do you agree?

16 MR. FLETCHER: Yes.

17 JUSTICE KAVANAUGH: Okay. And in  
18 Stern, the Chief Justice's opinion said that  
19 public rights extended, quoting Northern  
20 Pipeline's plurality, only to matters arising  
21 between individuals and the government in  
22 connection with the performance of the  
23 constitutional functions of the executive or  
24 legislative departments that historically could  
25 have been determined exclusively by those

1 branches, which suggests a line that may track  
2 the Due Process Clause between benefits and  
3 penalties.

4 And I want you to respond. Is that  
5 incorrect, that statement, or is -- what --  
6 what's -- what's the -- your response to that  
7 line from Stern v. Marshall?

8 MR. FLETCHER: Yeah. So the Court has  
9 said that a couple times. I want to -- to say  
10 what I think it means, and then I hope to say  
11 why I think, if you read it the other way, as  
12 you're suggesting, that might have some really  
13 troubling implications.

14 JUSTICE KAVANAUGH: Sure. Go ahead.

15 MR. FLETCHER: So, on what I think it  
16 means, I think the Court is talking about  
17 matters that could be determined exclusively by  
18 the other branches insofar as Article III is  
19 concerned. I don't take it to be saying things  
20 that you could assign to the executive branch  
21 and foreclose all judicial review altogether.

22 I think that's true of a lot of the  
23 things that we think of as being classic public  
24 rights-type cases. And I think the reason why I  
25 would warn you away from reading it differently

1 is that if you read it that way, as some of the  
2 scholarship has done, then I think Congress  
3 really and this Court has only two choices.

4 Option one is Congress can assign  
5 something to the initial adjudication by an  
6 administrator, but if that can happen, then the  
7 implication is it can also bar judicial review  
8 altogether.

9 And Option two is it has to go to an  
10 Article III court in the first instance, and  
11 that would be a sea change for all sorts of  
12 things that are not benefits, but I'm talking  
13 about, you know, the assessment and collection  
14 of taxes and penalties, Customs and penalties,  
15 the immigration laws, the detention and removal  
16 of non-citizens. All of those things are things  
17 that are done in the first instance and have  
18 long been done in the first instance by  
19 administrative officers.

20 And if you adopt the rule that it's  
21 only things that we can say can be done  
22 exclusively by the administrative officers  
23 without any judicial review at all, then I think  
24 you're in a really untenable choice in those  
25 areas and lots of others too.



1 JUSTICE KAVANAUGH: Right. But the  
2 flip side, I guess -- and you've said this --  
3 you know, this started with Atlas Roofing -- you  
4 know, I know you have your cases it relies on,  
5 1972 ACUS report that you properly mentioned,  
6 and it seemed like a small matter then  
7 potentially, but, as others have pointed out, it  
8 expands to other agencies.

9 And I think the logic of your position  
10 is that you could go all the way in the other  
11 direction from what you were just saying and the  
12 Congress could assign all federal government  
13 civil penalty suits to be housed at in-house  
14 executive agencies.

15 Is that your position?

16 MR. FLETCHER: Potentially, yes, you  
17 know, again, if it fits all the criteria.

18 JUSTICE KAVANAUGH: What's the  
19 potentially?

20 MR. FLETCHER: I -- I -- I think the  
21 questions that you'd want to ask are, you know,  
22 there are constraints about is this the sort of  
23 federal regulatory scheme that you're talking  
24 about in Atlas Roofing and here that's always  
25 been a feature of these. We're not just trying

1 to have -- federalize, you know, tort law or  
2 something like that.

3 JUSTICE KAVANAUGH: Right.

4 MR. FLETCHER: Right? Also, there are  
5 constraints on what can be done through civil  
6 means rather than criminal means in terms of the  
7 severity of the sanctions that can be imposed.

8 JUSTICE KAVANAUGH: But assuming those  
9 things away, yes, the logic of your position is  
10 that --

11 MR. FLETCHER: Yeah.

12 JUSTICE KAVANAUGH: -- that -- well,  
13 and on the Due Process Clause, because you've  
14 said let's talk not about the Seventh Amendment  
15 but the Due Process Clause --

16 MR. FLETCHER: Yeah.

17 JUSTICE KAVANAUGH: -- that seems  
18 problematic to say the government can deprive  
19 you of your property, your money, substantial  
20 sums, in a tribunal that is at least perceived  
21 as not being impartial in the sense that it's an  
22 in-house executive agency where the  
23 commissioners start the enforcement process,  
24 oversee the enforcers, and then appoint the  
25 adjudicators and review the adjudication. That

1 doesn't seem like a neutral process.

2 So your response to that is Atlas  
3 Roofing?

4 MR. FLETCHER: Well, a -- a couple. I  
5 mean, first of all, you know, we haven't talked  
6 at all about the removal issue yet. I guess I  
7 --

8 JUSTICE KAVANAUGH: I'm going to get  
9 to that.

10 MR. FLETCHER: Then I'll -- then I'll  
11 save it for that.

12 (Laughter.)

13 MR. FLETCHER: I was just going to say  
14 that to the extent that those are concerns, the  
15 remedy that my friends are asking for on the  
16 removal question goes in exactly the opposite  
17 direction.

18 JUSTICE KAVANAUGH: Right, would  
19 exacerbate it, yeah. Okay.

20 MR. FLETCHER: Exactly. So -- but  
21 saving that for removal and focusing just on the  
22 -- the Seventh Amendment and -- and that  
23 question, you know, I -- I think the takeaway  
24 that I would give you from the unappealing  
25 dichotomy that the sort of really strict

1 understanding of trying to locate this rule in  
2 Article III and saying only if it could be  
3 exclusively assigned to an administrative agency  
4 with no judicial review at all can it ever be  
5 assigned to them, on the one hand, or  
6 everything's got to go to the district court in  
7 the first instance, you know, I think that's  
8 untenable as a practical matter. It's  
9 overturning a huge swath of law.

10 I think if you have concerns about  
11 that -- and, again, this wouldn't be the case to  
12 explore them -- but if you did, I think the Due  
13 Process Clause is a better tool because it  
14 provides the ability to draw finer distinctions  
15 than the sort of blunderbuss ones that I think  
16 you would be forced into if you adopted the  
17 public rights Article III inquiry as the  
18 solution to -- to any problem you perceive  
19 there.

20 JUSTICE KAVANAUGH: One of the  
21 oddities of this statutory scheme is that the  
22 SEC is authorized to and, in fact, does bring  
23 suits in federal court. Why?

24 MR. FLETCHER: I think that's a part  
25 of the chronology, really. You know, the suits

1 in federal court, by and large, came first in --  
2 in terms of when penalties could be sought, and  
3 Congress later came along and added them to the  
4 administrative proceedings as well. You know, I  
5 think that's different. Congress is making  
6 judgments at different times.

7 JUSTICE KAVANAUGH: But why would the  
8 SEC bring suits in federal court?

9 MR. FLETCHER: I'm sorry, I thought  
10 you were talking about the --

11 JUSTICE KAVANAUGH: No, I -- I was.  
12 You answered the correct question, but a  
13 follow-on question is why would -- would the SEC  
14 bring suits in federal court?

15 MR. FLETCHER: Yeah, so it makes that  
16 judgment on a case-by-case basis, depending on  
17 the case. And it might depend on what remedies  
18 are available in the two forums. Here penalties  
19 are available in both, but there are certain  
20 other remedies that differ, and they might make  
21 a judgment about that.

22 They might also make a judgment about  
23 which one is likely to be faster under the  
24 circumstances of the case. There are some  
25 circumstances where -- especially where they've

1 settled a case or where it's a sort of follow-on  
2 proceeding that's going to be very simple that  
3 they choose to file those administratively  
4 rather than burdening the courts with those.

5 And there are other circumstances  
6 where they have a very technical regulatory  
7 issue that they're looking to achieve consistent  
8 treatment across a bunch of cases, and they  
9 conclude that that can more easily be done  
10 administratively than in court.

11 JUSTICE KAVANAUGH: But in terms of  
12 the repercussions if we went down the civil  
13 penalty line, for the SEC, at least, they could  
14 bring all -- all the civil penalty suits in  
15 federal court. If benefits were the other side  
16 of the line, that excludes Social Security and  
17 those kinds of agencies. Why don't you talk  
18 about, because I think you were talking about  
19 this with Justice Gorsuch, the ramifications if  
20 the line were civil penalty in terms of other  
21 agencies?

22 MR. FLETCHER: Yeah, so I -- I think  
23 they are large. You know, already in Atlas  
24 Roofing, the Court said that these are common.  
25 They've become only more so since the 1992 ACUS

1 report that we cite says that that --

2 JUSTICE KAVANAUGH: The -- small  
3 interruption. They could always just bring the  
4 suit in federal court, though. They're filing  
5 everything in the in-house tribunal. They could  
6 just file the same kinds of things in federal  
7 court.

8 MR. FLETCHER: The SEC, yeah -- yes,  
9 but I thought we were shifting over --

10 JUSTICE KAVANAUGH: Yes.

11 MR. FLETCHER: -- to others agencies  
12 as well.

13 JUSTICE KAVANAUGH: Some of them can  
14 and some --

15 MR. FLETCHER: Some --

16 JUSTICE KAVANAUGH: -- would need new  
17 statutes.

18 MR. FLETCHER: Some can; many cannot.  
19 And to bring all those cases that are now  
20 proceeding administratively into the courts  
21 would be a huge imposition on the courts. And  
22 just in terms of the numbers, you know, the 1992  
23 ACUS report that we cite counted more than 200  
24 statutes at that point. And we very quickly got  
25 to two dozen agencies that have the authority to

1     impose penalties in administrative proceedings  
2     now. So it -- it really would be -- I don't  
3     want you to think that it's just about the SEC  
4     and it can just go to court --

5             JUSTICE KAVANAUGH: Yeah.

6             MR. FLETCHER: -- because it could  
7     really have wide repercussions.

8             JUSTICE KAVANAUGH: No, I know FTC and  
9     -- and others. I'm aware of that.

10            MR. FLETCHER: EPA, Agriculture. I  
11     mean, it's -- it's really all over.

12            JUSTICE KAVANAUGH: FERC. We have a  
13     FERC amicus brief.

14            Okay. On the Article II question  
15     quickly, one question there, that this seems  
16     problematic under Free Enterprise Fund.

17            MR. FLETCHER: So, Justice Kavanaugh,  
18     I actually disagree. You know, of course, in  
19     footnote 10, Free Enterprise Fund reserved this  
20     question. And I understand there are some times  
21     where the Court technically reserves a question  
22     but the logic of the prior decision effectively  
23     answers it. And I just think this is exactly  
24     the opposite. So the Court said here we have  
25     something that's novel, it's completely



1       unprecedented, and it effectively insulates a  
2       law enforcement and policymaking board from the  
3       SEC's control.

4                   And here none of those things are  
5       true. This isn't novel. It goes back to a  
6       carefully negotiated compromise in the APA  
7       itself, adopted with the support and after study  
8       by the executive branch and Congress. It's been  
9       the law for more than three-quarters of a  
10      century.

11                   JUSTICE KAVANAUGH: Thank you.

12                   CHIEF JUSTICE ROBERTS: Justice  
13      Barrett.

14                   JUSTICE BARRETT: My questions are  
15      just clarifying just to make sure I understand  
16      exactly where you're going here. Okay. So this  
17      is public rights, not private rights, because it  
18      doesn't map on exactly to common law fraud. You  
19      don't have to show as much. You don't have to  
20      show damages.

21                   MR. FLETCHER: Principally, our view  
22      is it's public rights, not private rights,  
23      because it's enforcement by the government of  
24      rights that are held in the public to vindicate  
25      a public interest in the securities markets.

1           We think also, in addition, there's no  
2   concern that Congress is circumventing the laws  
3   of fraud by just replicating or federalizing the  
4   common law fraud, because the elements are very  
5   different. But that's not the principal  
6   distinction we're --

7           JUSTICE BARRETT: Not the principal  
8   distinction. Okay. If the SEC pursued Jarkesy  
9   in federal district court, he's entitled to a  
10   jury?

11          MR. FLETCHER: Yes.

12          JUSTICE BARRETT: And that's because  
13   it's a suit, because the judge is the fact  
14   finder?

15          MR. FLETCHER: That's because it's a  
16   suit --

17          JUSTICE BARRETT: Well, and --

18          MR. FLETCHER: And -- and -- and --  
19   under this --

20          JUSTICE BARRETT: Yes. Suits --

21          MR. FLETCHER: -- Court's analysis in  
22   Tull --

23          JUSTICE BARRETT: Yes. Qualify --

24          MR. FLETCHER: -- it would qualify as  
25   triggering a Seventh Amendment right.

1 JUSTICE BARRETT: -- judicial  
2 proceedings.

3 MR. FLETCHER: Exactly. Yes.

4 JUSTICE BARRETT: But when it's  
5 brought in front of the ALJ, exact same  
6 proceeding, but it's executive action there  
7 because the ALJ and the agency is the one  
8 finding the facts?

9 MR. FLETCHER: Exactly. It looks like  
10 a trial. It has trial-type procedures, but  
11 that's an exercise of executive power. The jury  
12 trial right has always been thought of as an  
13 adjunct to the exercises of the judicial power  
14 in the courts. And the lesson from all of this  
15 Court's cases, City of Arlington, Murray's  
16 Lessee, is that even when the executive branch  
17 conducts an adjudication and applies the law to  
18 the facts, even if it looks like trial-type  
19 procedures to enhance fairness, that's not the  
20 sort of suit that requires an exercise of the  
21 judicial power, or comes with --

22 JUSTICE BARRETT: Because it's  
23 forum-dependent?

24 MR. FLETCHER: Exactly.

25 JUSTICE BARRETT: Okay. And then I

1 just want to clarify, Justice Kavanaugh asked  
2 you what's the limiting principle because  
3 Congress always, we hope, is acting in the  
4 public interest. So what is the limit on  
5 Congress's ability to shift these kind of  
6 adjudications for civil penalties to  
7 administrative agencies?

8 MR. FLETCHER: Yeah, so, again, it has  
9 to be a federal regulatory scheme. It has to be  
10 enforced by the government. That's the critical  
11 public rights distinction. We're not displacing  
12 the courts from adjudicating disputes between  
13 private parties and raising that set of  
14 separation-of-powers concerns.

15 In addition, I think you could say we  
16 don't have any concerns about just federalizing  
17 the law of fraud or something like that. This  
18 is very different. It's a comprehensive  
19 regulatory scheme like the one the Court had in  
20 the OSH Act. And then, in addition, you have  
21 the sort of constraints on when Congress can  
22 assign something to an administrative agency in  
23 the Due Process Clause in the civil/criminal --

24 JUSTICE BARRETT: But just to  
25 interrupt for one second, but, you know, we are

1     talking here about securities law, but Congress  
2     can enact such schemes and has enacted such  
3     schemes in many, many, many different areas.  
4     The Chief Justice began by pointing some of  
5     those out. So in all of these areas,  
6     healthcare, highway management, what have you --

7             MR. FLETCHER: Exactly. And --

8             JUSTICE BARRETT: -- it could happen.

9             MR. FLETCHER: So I -- I acknowledge  
10     that the rule that I'm giving you is broad.  
11     That's in part because Congress has done this in  
12     many, many different circumstances. We think  
13     validly so. But the breadth of the rule is  
14     consistent with our historical practice and with  
15     this Court's decisions, you know, not just Atlas  
16     but before that too.

17            JUSTICE BARRETT: Okay. So we've  
18     talked some about fallout. So here what the SEC  
19     got from Jarkesy in disgorgement was more than  
20     civil penalties.

21            MR. FLETCHER: Correct.

22            JUSTICE BARRETT: Right. And the SEC  
23     also got other kinds of injunctive relief.

24            MR. FLETCHER: Correct.

25            JUSTICE BARRETT: Right. So why isn't

1     -- why do you need civil penalties? Because,  
2     you know, Jarkesy is not disputing that you can  
3     get those kinds of things in administrative  
4     proceedings. So why civil penalties too?

5             MR. FLETCHER: So can I just quibble  
6     with the premise? Because this is one of the  
7     things that concerns us about this case.

8             JUSTICE BARRETT: Okay.

9             MR. FLETCHER: He is focused on civil  
10    penalties, but disgorgement also affects the  
11    private right to property. And some of his  
12    arguments, I think the implication of them is  
13    those things also couldn't happen in  
14    administrative proceedings. I'm a little  
15    unclear about that because the argument moves  
16    back and forth from Article III to the Seventh  
17    Amendment, but I think the potential  
18    implications of cutting back on the Atlas  
19    Roofing understanding of public rights doesn't  
20    just apply to penalties. It's also cases  
21    involving disgorgement or other such remedies.

22            JUSTICE BARRETT: Even if they were  
23    considered traditionally equitable remedies?

24            MR. FLETCHER: So, again, if -- if you  
25    -- there's a couple ways that you could depart

1 from Atlas Roofing. One would be to say we're  
2 decoupling the Seventh Amendment from the  
3 Article III inquiry, and we're going to  
4 recognize a new class of suits where Article III  
5 would let you give it to an agency, but the  
6 Seventh Amendment still requires a trial by  
7 jury. There I think such a rule might be  
8 limited to civil penalties because the other  
9 remedies are equitable.

10 But if you go in the other direction,  
11 which some of my friends have suggested and some  
12 of the questions have suggested, and say any  
13 time you have an administrative action that  
14 affects private property or liberty or anything  
15 else that's public rights, that means that under  
16 Article III, it can't go to the agency to begin  
17 with.

18 JUSTICE BARRETT: Yeah, I agree with  
19 you there. Okay. Thank you, Mr. Fletcher.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Jackson.

22 JUSTICE JACKSON: So I agree that  
23 Atlas Roofing resolves this case, but like many  
24 of my colleagues, I guess I don't understand  
25 your reading of Atlas Roofing as suggesting

1     there's no Seventh Amendment issue at all if the  
2     fact-finding function is assigned to the agency.

3             I mean, the case begins, sentence one,  
4     the issue in this case -- in -- in these cases  
5     is whether, consistent with the Seventh  
6     Amendment, Congress may create a new cause of  
7     action in the government for civil penalties  
8     enforceable in an administrative agency where  
9     there is no jury trial.

10            You seem to say, well, it depends on  
11     whether Congress has assigned resolution of this  
12     to the agency. But that seems totally  
13     conclusory and circular to me. And I think the  
14     question is when does the Seventh Amendment  
15     prohibit Congress from assigning it to the  
16     agency as opposed to giving it to an Article III  
17     court?

18            You say that's forum-dependent, but --  
19     but the -- the question is when can they give it  
20     to one forum versus the other? And in my view,  
21     the Seventh Amendment and what Atlas Roofing is  
22     saying is that it's -- it's claim-dependent.  
23     It's the part of your argument where you talk  
24     about is this a situation in which Congress is  
25     taking a common law duty, right, action, or



1     whatever and moving it into the administrative  
2     process?

3             And so the Seventh Amendment says you  
4     can't do that. If a person has a common law  
5     right of fraud, right, the common law creates  
6     duties like the duty not to make a  
7     representation that people rely on to their  
8     detriment. And it's established a right of  
9     action in private parties to enforce that duty.  
10    They can come to court.

11            And the Seventh Circuit -- the Seventh  
12    Amendment says, when you have such a right to  
13    enforce that duty, you are -- by the  
14    Constitution, you have -- you -- you have the  
15    ability to come to court. The government can't  
16    make you go to some administrative tribunal and  
17    have no jury. All right?

18            But there are also other duties in the  
19    world. Those duties can be created by statute,  
20    right? They're not common law duties. And when  
21    you have a new duty -- Atlas Roofing many, many  
22    times talks about this being a new statutory  
23    duty that has been created. When you have a new  
24    duty, the Seventh Amendment isn't implicated.

25            MR. FLETCHER: Justice Jackson, that's

1 just not right. If it's a new duty --

2 JUSTICE JACKSON: Okay.

3 MR. FLETCHER: -- that's enforced in  
4 court, even statutory rights enforced in court  
5 can trigger Seventh Amendment rights.

6 JUSTICE JACKSON: No, I understand,  
7 but the -- but Atlas Roofing also speaks to  
8 that. It says Congress can choose to allow you  
9 to enforce or allow the government to enforce  
10 this new duty in court versus the administrative  
11 proceeding, and when it chooses court, then you  
12 have the Seventh Amendment right.

13 MR. FLETCHER: Right.

14 JUSTICE JACKSON: But, if it chooses  
15 -- I think your choice comes later in the  
16 analysis. If it chooses administrative action,  
17 it is enforcing a statutory duty. The Seventh  
18 Amendment isn't implicated. And there we are.

19 MR. FLETCHER: So I think we're saying  
20 the same thing. And the only place I might  
21 differ is that in that if the -- if Congress  
22 chooses the administrative forum instead, we  
23 think there's an Article III inquiry there where  
24 you have to ask does Article III let Congress  
25 choose the administrative inquiry.

1 JUSTICE JACKSON: That's fine. But  
2 Atlas -- I couldn't find Article III in Atlas  
3 Roofing. It's not talking about that aspect of  
4 the analysis. It's, I thought, talking about  
5 when Congress at the beginning creates a new  
6 statutory duty, and in this case, it's the duty  
7 not to, what, employ any device, scheme, or  
8 artifice to defraud in the context of securities  
9 transactions.

10 There's a new statute, you've got this  
11 new duty, Congress says there it is, and we're  
12 giving it to the government to enforce this for  
13 the benefit of the public. All right? That's  
14 the beginning.

15 MR. FLETCHER: Mm-hmm.

16 JUSTICE JACKSON: In that situation,  
17 does the Seventh Amendment kick in? I think  
18 Atlas Roofing says no, because we're not talking  
19 about a situation in which Congress has  
20 alternatively said any common law fraud claim  
21 out there in the world concerning securities has  
22 to now be brought in this administrative action.

23 If you're relying on the common law  
24 and you're bringing this kind of claim, you  
25 don't get a jury trial anymore. You have to

1       come before the SEC. That's a Seventh Amendment  
2       problem because we're steal -- do you understand  
3       what I'm saying?

4               MR. FLETCHER: Mm-hmm.

5               JUSTICE JACKSON: Like, so it's a suit  
6       at common law because you have the common law  
7       claim that is now implicating the Seventh  
8       Amendment right. But it's not a suit at common  
9       law when Congress creates a new duty and gives  
10      it to the SEC or some agency to enforce.

11              MR. FLETCHER: Through administrative  
12      proceedings.

13              JUSTICE JACKSON: Through  
14      administrative proceedings.

15              MR. FLETCHER: Yes. Yes. Then we're  
16      landing in exactly the same place, yes. And I  
17      think I may just be baking in some additional  
18      hoops that Congress has to jump through, but I  
19      -- I'm not disagreeing with your bottom line.

20              JUSTICE JACKSON: All right. And I  
21      think the problem then is that if I'm right  
22      about this, then I think it solves a lot of the  
23      concerns that my colleagues have about Congress  
24      shifting into, you know, a -- you know, certain  
25      things into administrative proceedings because,

1 really, the Seventh Amendment is only implicated  
2 if they're shifting into administrative  
3 proceedings things that were suits at common  
4 law, meaning claims at common law.

5 They're -- they're stealing from the  
6 private person who's protected by the  
7 Constitution that right, right?

8 MR. FLETCHER: Yes.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Mr. McColloch.

13 ORAL ARGUMENT OF S. MICHAEL MCCOLLOCH  
14 ON BEHALF OF THE RESPONDENTS

15 MR. MCCOLLOCH: Mr. Chief Justice, and  
16 may it please the Court:

17 Congress has steadily expanded the  
18 SEC's authority over the past several decades  
19 and now, like a house that's been added onto too  
20 many times, it's -- it's crushing the original  
21 foundation.

22 For the Seventh Amendment, that  
23 foundation was set in 1791. The founders  
24 thought that they had enshrined this right for  
25 government claims against citizens' property

1 rights, still staying from the Stamp Act and the  
2 abuses of the vice admiralty courts.

3 My friend's really radical position is  
4 antithetical, totally antithetical, to the  
5 founders' intent. The jury trial right should  
6 apply especially when the government is coming  
7 after a citizen for penalties on a common law  
8 claim.

9 The SEC's position really fares no  
10 better under the public rights doctrine. The  
11 basic claims -- these basic fraud claims are  
12 litigated privately among private parties every  
13 day, same claims, same statutes, and they've  
14 been litigated -- the same basic claims have  
15 been litigated for centuries.

16 These underlying claims do not  
17 suddenly morph into public rights claims just  
18 because the government happens to stand in as  
19 the -- as the proxy plaintiff.

20 You'd be surprised to hear this from  
21 our briefing, but we don't think you need to  
22 overrule Atlas Roofing. Atlas Roofing actually,  
23 as modified by subsequent decisions, provides a  
24 useful template for analyzing at least the  
25 public/private rights analysis and leads to the

1 same conclusion that Mr. Jarkesy was entitled to  
2 -- to a jury for these claims. And, by the way,  
3 it's pronounced Jarkesy, not -- not a number of  
4 other ways that it -- that it's been pronounced  
5 by -- by many.

6 The -- the bottom line is these claims  
7 can't be considered peculiarly suited, uniquely  
8 suited, for summary agency adjudication when the  
9 SEC's been trying these same claims in real  
10 federal -- Article III federal courts for  
11 decades. It doesn't make any sense.

12 And even if they could, the Article I  
13 assignment was not -- was not the SEC's to make.  
14 It's a quintessential legislative power, as this  
15 Court has -- has held, and it doesn't convert it  
16 into executive power just because it's exercised  
17 by the executive, which is essentially their  
18 argument.

19 And, finally, the -- the structural  
20 error of the Take Care Clause is a -- is a -- is  
21 a clear violation. We all agree that the ALJs  
22 at the SEC are constitutional officers, and we  
23 all agree that they're protected by at least two  
24 layers of for-cause tenure protection. Mr.  
25 Jarkesy's entitled to vacatur.

1                   Be happy to take your questions.

2                   JUSTICE THOMAS: You seem to read  
3   Atlas different from the government, and it  
4   seems as though you have a polar opposite  
5   position from the government.

6                   Would you spend some time on what the  
7   differences are in your view of Atlas?

8                   MR. McCOLLOCH: Yes -- yes, Your  
9   Honor.

10                  So, you know, if you read Atlas  
11   Roofing carefully, it -- it -- I could give you  
12   a list of several things that were, I think,  
13   very wrong about it, most of which have been  
14   addressed and more or less corrected by -- by  
15   subsequent decisions.

16                  But, in Atlas Roofing, it's -- it's  
17   helpful to realize that the Court right before  
18   it discussed the -- how -- how the OSHA claims  
19   are new and how different they are, the Court  
20   discussed a decision seven years earlier, *Ross*  
21   *v. Bernhard*, where the Court held that a  
22   shareholder derivative action against directors  
23   and third parties under one of the securities  
24   acts, the Investment Company Act, which  
25   prevented larceny, embezzlement,



1     misrepresentations, the same exact claims that  
2     are alleged in this -- in this case here against  
3     Mr. Jarkesy.

4             Back then, under the common law, a  
5     shareholder derivative action had to be in a  
6     court of equity. So you don't get a jury in a  
7     court of equity. We'll get to the -- the -- the  
8     forum impact later. We'll address that in a few  
9     minutes.

10            But the Court held that because the  
11     real plaintiff in a shareholder derivative  
12     action is the corporation, the corporation, if  
13     it took these claims to court, it was I think  
14     against Lehman Brothers for fraud, if they took  
15     these claims to court, then the corporation  
16     would be entitled to a jury.

17            And so, therefore, because the  
18     underlying claim belongs to the corporation, the  
19     underlying claim is a private one. The  
20     underlying claim -- the real victim was the  
21     company, so they're entitled to a jury. So the  
22     -- the Court juxtaposes that. You look at the  
23     nature of the claim versus the elements of these  
24     OSHA claims.

25            Now the OSHA -- and this gets really

1 right to the heart of what the problem here is.  
2 OSHA created a number of brand -- brand new, the  
3 Court used the word new, I think, 11 times in  
4 that decision, used that to describe these --  
5 these regular -- very -- a lot of minutiae, very  
6 precise regulatory requirements, such as what  
7 Atlas Roofing got penalized for, I think, \$600  
8 for improper placement of a roof or a ceiling  
9 cover.

10 So these were not claims that ever  
11 existed at common law. And those claims --

12 JUSTICE KAGAN: But, Mr. McColloch --

13 MR. MCCOLLOCH: Yes.

14 JUSTICE KAGAN: -- if I could  
15 interrupt you for a second. I mean, I have to  
16 say you're sort of describing a case that I  
17 don't recognize. Atlas Roofing says numerous  
18 times, it could not have been clearer, the  
19 Seventh Amendment is no bar to the creation of  
20 new rights or to their enforcement outside the  
21 regular courts of law. That's one statement.

22 Congress is not required by the  
23 Seventh Amendment to choke the already crowded  
24 federal courts with new types of litigation or  
25 prevent it from committing some new types of

1 litigation to administrative agencies with  
2 special confidence. That's another.

3 There's another. There's another.  
4 There's another. I agree with you it says "new  
5 claims." We can talk about what "new claims"  
6 is. But it could not have been clearer that --  
7 that what they were saying is that the Seventh  
8 Amendment was no bar to Congress making a  
9 decision that certain kinds of claims were best  
10 adjudicated in administrative agencies.

11 MR. MCCOLLOCH: Yes, Your Honor, and  
12 -- and I think we're -- we're pretty close,  
13 actually. So maybe the -- the -- the dispute is  
14 over what "new" is.

15 JUSTICE KAGAN: If we're pretty close,  
16 because I think that just resolves the case.

17 MR. MCCOLLOCH: No.

18 JUSTICE KAGAN: That's the issue.

19 (Laughter.)

20 JUSTICE KAGAN: I mean, that's the  
21 issue. That's the result.

22 MR. MCCOLLOCH: Well --

23 JUSTICE KAGAN: The Seventh Amendment  
24 is no bar.

25 MR. MCCOLLOCH: Well, and,

1 respectfully, Your Honor, for several reasons,  
2 that's where we very much part -- part ways.

3 (Laughter.)

4 JUSTICE KAGAN: I thought that was  
5 going to be true.

6 (Laughter.)

7 MR. MCCOLLOCH: That -- that and the  
8 -- the reason is these -- these -- the Court  
9 left aside traditional wrongful death and  
10 negligent claims which is -- which the Congress  
11 had found that was -- those -- that litigation  
12 was insufficient to protect factory workers and  
13 other people in the workplace. And so Congress  
14 said we're going to create these new  
15 regulations --

16 JUSTICE KAGAN: Now we are close.

17 MR. MCCOLLOCH: -- all -- all these  
18 new duties.

19 JUSTICE KAGAN: I think that that's  
20 exactly right. I think that OSH Act was -- I  
21 mean, it -- it didn't -- the holding was not  
22 dependent on this necessarily, but -- but OSH  
23 Act says, look, there were ways to proceed  
24 against these kinds of employers in federal  
25 court. You could bring a negligence suit. You

1     could bring a wrongful death suit. But, the  
2     Court says, Congress thought that wasn't enough.  
3     Congress thought you shouldn't have to wait  
4     until the injury happens. And so Congress gave  
5     power to OSHA under the OSH Act in order to  
6     bring claims for all kinds of workplace safety  
7     issues before a death took place, before an  
8     injury occurred.

9             And that's exactly what the securities  
10    laws do. It says we don't need an injury. We  
11    don't need reliance. We're constructing a  
12    prophylactic scheme, and we're constructing it  
13    because we understand that the securities  
14    markets need to be honest and fair, and people  
15    need to be able to rely on them. And so it  
16    takes a common law suit and says we're going to  
17    throw out some of these elements and we're going  
18    to create a prophylactic way to make the  
19    securities markets fair and put it in an  
20    administrative agency. Exactly what OSH Act  
21    did.

22            MR. MCCOLLOCH: Okay. Your Honor, the  
23    -- the -- okay. So the -- the word  
24    "prophylactic" is -- is a useful one, as -- as  
25    my friend --

1 JUSTICE KAGAN: It's a big word. I  
2 mean nothing by it, other than we're not going  
3 to wait for the harm to occur.

4 MR. MCCOLLOCH: Correct. And those --  
5 we have -- we have no problem with those being  
6 declared public rights, those being tried in  
7 administrative forums where -- where -- without  
8 the right to a trial by jury. Those  
9 prophylactic claims were never recognized in the  
10 courts of England in the late 18th century.

11 So what -- what the Court in Atlas  
12 Roofing did, after contrasting from Ross  
13 v. Bernhard what a true private claim is, what a  
14 private rights claim is, the Court in Atlas  
15 Roofing said we'll leave these -- this -- this  
16 traditional litigation aside, we're going to  
17 create the prophylactics, the prophylactics can  
18 go to an Article I forum just -- and -- and they  
19 didn't destroy or eliminate the wrongful death  
20 and negligent actions. Those -- those are still  
21 there. They're still there today.

22 JUSTICE KAGAN: And Atlas Roofing says  
23 that is perfectly fine to do. It is perfectly  
24 fine, you have these -- these suits that can go  
25 forward in federal court, but that's not enough

1 to solve the problem, Congress thought.

2 And -- and -- and Atlas Roofing says  
3 we respect Congress's decision that that's not  
4 enough for wrongful death suits to go forward in  
5 federal court. We're going to set up an agency.  
6 We're going to empower the agency, Congress  
7 says, to do things even when there is no harm,  
8 to do things that -- you -- to -- to adjudicate  
9 disputes that you couldn't adjudicate in a  
10 federal court. And Atlas Roofing says the  
11 Seventh Amendment poses no barrier to that. The  
12 end of this case.

13 MR. MCCOLLOCH: And I think -- and the  
14 reason Your Honor, respectfully, it's -- it's  
15 not the end of this case is -- is twofold.  
16 Number one, the -- the -- the charges against  
17 Mr. Jarkey were for traditional fraud with  
18 harm, with damages, which is what he was  
19 penalized for, what Patriot28 was -- was ordered  
20 disgorgement for.

21 So the -- the -- the charges, the  
22 allegations in the order instituting proceedings  
23 and -- and in the final order of the Commission  
24 were traditional fraud claims --

25 JUSTICE JACKSON: No, I'm sorry. By

1 -- by nature or were -- was that the actual  
2 cause of action? Because for me that matters.  
3 Was the government coming in and saying the  
4 cause of action here is traditional fraud? Is  
5 the -- is -- we're relying on the common law  
6 cause of action to be bringing this claim  
7 against Mr. Jarquesy?

8 MR. MCCOLLOCH: They brought it under  
9 the 10b-5 statutory provisions.

10 JUSTICE JACKSON: Right. So they were  
11 bringing the cause of action under the statute  
12 that they had -- that Congress had created,  
13 right?

14 MR. MCCOLLOCH: Yes, Your Honor, but  
15 -- but with actual harm alleged.

16 JUSTICE JACKSON: No, no, no, I  
17 understand. The allegations may overlap with a  
18 fraud claim. They could have chosen the common  
19 law as the cause of action and brought a common  
20 law claim, but I think if they had done that,  
21 the Seventh Amendment would say you have to do  
22 that in the -- you know, a regular court. But,  
23 instead, what they said is we're going to do the  
24 cause of action that exists under the federal  
25 statute that creates this new right, and per



1 Atlas Roofing, the Court says there's no Seventh  
2 Amendment barrier to them bringing that claim in  
3 an administrative agency, rather than the court.

4 MR. McCOLLOCH: And what this Court  
5 has held repeatedly is that that is not a new  
6 right. If you -- and I come back to  
7 Granfinanciera, probably the -- the best  
8 explanation of this. This Court rejected the  
9 taxonomic change taking a common law right,  
10 putting it into a statute -- statutory scheme,  
11 mixing it in with a bunch of public rights, and  
12 it's maybe changed a little bit, but what this  
13 --

14 JUSTICE BARRETT: But wasn't it --

15 JUSTICE JACKSON: Wasn't --

16 JUSTICE BARRETT: Go ahead.

17 MR. McCOLLOCH: This Court --

18 JUSTICE BARRETT: I --

19 MR. McCOLLOCH: Yes, Your Honor.

20 JUSTICE BARRETT: Sorry. I was just  
21 going to say, but Justice Jackson is asking an  
22 important question here because we pointed out  
23 in our discussions with Mr. Fletcher that our  
24 cases have not been very clear about how to  
25 distinguish public from private rights.

1                   And if I understand you correctly, and  
2     if I understood your brief correctly, you're  
3     really saying that the distinction depends on  
4     whether this was a right at common law, and here  
5     this bears a lot of resemblance to a right at  
6     common law, the fraud. Am I --

7                   MR. MCCOLLOCH: Yes, Your Honor.

8                   JUSTICE BARRETT: -- right? Okay. So  
9     I -- but I think part of what your colloquy with  
10    Justice Jackson is showing is that this isn't  
11    exactly fraud. And it can be kind of difficult  
12    to say is this just like -- I mean, it doesn't  
13    have to be an exact match, but how close is this  
14    to the common law tort of fraud?

15                  So what kind of a test would you  
16    propose for deciding whether something  
17    represented that common law right? I mean, Mr.  
18    Fletcher's test has the virtue -- it's very  
19    broad, but it has the virtue of being a pretty  
20    bright line.

21                  MR. MCCOLLOCH: Yes, so this Court has  
22    held that a -- a -- a claim that serves the same  
23    essential function as a traditional common law  
24    right is -- is -- is a private right.

25                  JUSTICE BARRETT: Does that solve

1 Justice Kagan's problems? Because couldn't you  
2 say that the OSHA Act did that? You know,  
3 protected -- served kind of the same functions  
4 as -- as negligence and wrongful death suits?

5 MR. MCCOLLOCH: It does not serve the  
6 same function. It's -- it's more -- it's  
7 addressing more --

8 JUSTICE BARRETT: It's prophylactic.

9 MR. MCCOLLOCH: -- prophylactic and  
10 inchoate conduct that leads up to actual harm.  
11 So they're -- they're really addressing two  
12 different things. And just like in the -- in  
13 the Securities Acts with what Mr. Jarkesy was  
14 charged with, the -- 95 percent of what's in the  
15 Securities Acts are not traditional common law  
16 claims. The things that the SEC enforces every  
17 day, almost all of it is public rights --

18 JUSTICE BARRETT: So insider trading,  
19 can that go to the administrative agency, or  
20 does that have to go --

21 MR. MCCOLLOCH: Insider trading is --  
22 is prosecuted under the traditional fraud  
23 claims. Again, the fraud sections in 10b-5 are  
24 -- and they -- they were taken out of, as our --  
25 our brief explains, they -- they were drawn

1 largely from what was -- what -- what common law  
2 fraud, how it was litigated at the time in the  
3 1930s.

4 And it was always a scheme of artifice  
5 fraud or misrepresentations, and that is --  
6 those are the sections under which insider  
7 trading cases are -- are prosecuted.

8 JUSTICE SOTOMAYOR: Could --

9 CHIEF JUSTICE ROBERTS: Would --

10 JUSTICE SOTOMAYOR: I'm sorry.

11 CHIEF JUSTICE ROBERTS: I was just  
12 going to ask how broadly your theory reaches  
13 beyond the SEC. I mean, does it cover tax  
14 deficiency proceedings?

15 MR. MCCOLLOCH: No, Your Honor. So,  
16 you know, there are certain things we -- again,  
17 we get into this definition, and part of why we  
18 have a problem with or we've -- we've pointed  
19 out to the Court our concerns about joining at  
20 the hip the public rights doctrine with -- with  
21 Seventh Amendment rights. But, you know, you  
22 get into what's the definition of -- of public  
23 rights versus private rights, and, first of all,  
24 by -- by default, claims are private rights.

25 The public rights is -- is called, as

1     this Court has called it, the public rights  
2     exception. But things -- things that are --  
3     are -- are of or belong to the government, there  
4     are claims that are between an individual and  
5     the government only.

6             So Customs, immigration, benefits,  
7     franchises, permissions, debts to the  
8     government, I would put taxes under debts to the  
9     government, and so there are things that were  
10    traditionally, like Customs, were always handled  
11    even back 240 years ago, were handled outside  
12    of -- of Article III, out of -- out of --  
13    outside of courts.

14            So there is -- there's that -- that  
15    limited universe of things that are between an  
16    individual and the government, but just, again,  
17    Granfinanciera I think resolved this and took a  
18    big bite out of Atlas Roofing when it rejected  
19    taxonomic changes, taking a common law claim,  
20    throwing it into a statutory scheme, like a  
21    tossed salad with a bunch of -- a bunch of  
22    public rights inserted, most of them  
23    prophylactic, and -- and then claiming, well, as  
24    to that private -- as to that private rights  
25    claim, it was private right, now it's public.

1                   And maybe we've reworded it a little  
2     bit.   Maybe we've added a section here or there.  
3     We've got --

4                   JUSTICE KAVANAUGH:   Mr. Fletcher says  
5     that that's only as to cases between private  
6     parties, however.   So how do you respond to  
7     that?

8                   MR. MCCOLLOCH:   Okay.   And -- and --  
9     and so this Court or -- this Court has not yet  
10    -- this is a matter of first impression in this  
11    precise context.   Atlas Roofing was the last  
12    case that kind of dealt with this issue where  
13    it's an enforcement action by -- by the  
14    government.

15                   But the Court has made crystal-clear  
16    that it does not matter who the -- the -- the --  
17    the parties are.   The Seventh Amendment right is  
18    based on -- or back -- back up.

19                   Private rights are based on the  
20    underlying -- the nature of the underlying  
21    claim, not the forum that the case happens to be  
22    filed in or adjudicated in and not who the  
23    parties are.

24                   JUSTICE KAGAN:   See, Mr. McColloch, I  
25    think that that's not a -- a right reading of

1     our precedent. I mean, what has happened since  
2     Atlas Roofing -- we've actually never had since  
3     Atlas Roofing another, if you will,  
4     public/public case, where -- public/private  
5     case, where there's a government entity on one  
6     side of the V, and the reason that we've not had  
7     those in 50 or 60 years is because those have  
8     been thought the easy cases.

9             What have been thought the hard cases  
10    -- Northern Pipeline, Shore, Granfinanciera,  
11    Stern, Oil States -- these are all private  
12    people on both sides of the V and, nonetheless,  
13    we've held that public rights might be involved  
14    because their disputes are embedded in federal  
15    statutory schemes.

16            So those are the hard cases. But  
17    we've never suggested that in a case where  
18    Congress has given an agency the power to  
19    enforce something and the agency is -- is  
20    bringing the charge, if you will, that --  
21    that -- that -- you know, that that's just not  
22    -- it's -- that's settled.

23            MR. MCCOLLOCH: Well, it -- it -- it's  
24    settled only to the extent no one's brought it  
25    up and forced this issue since Atlas Roofing in

1       this --

2                   JUSTICE KAGAN:   I agree.

3                   MR. McCOLLOCH:   -- in this context.

4                   JUSTICE KAGAN:   Nobody has had the,  
5       you know, chutzpah --

6                   (Laughter.)

7                   JUSTICE KAGAN:   -- to quote my people,  
8       to bring it up since Atlas Roofing.

9                   MR. McCOLLOCH:   And -- and -- and,  
10       here, again, I want to come back to -- to the  
11       Seventh Amendment for a minute because we -- we  
12       do get bogged down in public rights/private  
13       rights Article III, as my friend has -- has said  
14       that -- that the -- the Seventh Amendment is  
15       subservient to -- to Article III considerations  
16       and -- and congressional -- the vagaries of  
17       congressional decisions to assign something to  
18       Article I or Article -- Article III, which they  
19       can only do for -- for -- for public rights.

20                   But the -- you can't read many of  
21       the -- through the archives of the -- of the  
22       founders and the federalist and the  
23       anti-federalist writings and not come away with  
24       the conclusion that their concern -- one of  
25       their -- arguably, the primary concern certainly



1 of the anti-federalists, who won the debate over  
2 the Seventh Amendment, was to protect from  
3 jury-less courts adjudicating matters that  
4 existed at common law for penalties against  
5 citizens.

6 JUSTICE JACKSON: Exactly, Mr.  
7 McColloch. And so I'm asking, why isn't the  
8 reason that the private/private cases are hard  
9 because the Court is concerned that what might  
10 be happening is Congress is shifting things that  
11 were traditionally common law claims adjudicated  
12 between private people into this administrative  
13 process and not people -- giving people trials  
14 by juries?

15 Like, what makes it hard is when a  
16 statutory scheme looks like it could be  
17 displacing the normal common law private-to-  
18 private enforcement of a fraud claim.

19 But I think what Justice Kagan is  
20 saying is that the reason why these cases, the  
21 ones in which the statute is giving the  
22 enforcement authority to the government for the  
23 benefit of the public, are not hard and why  
24 people haven't continued to bring these is  
25 because it doesn't look anything like the common

1 law scenario where we've had two private parties  
2 fighting over fraud and they brought it to  
3 court.

4           Instead, Congress has created a new  
5 thing to supplement that private scenario or  
6 maybe it's brand new in any event, but it  
7 doesn't -- it's not a common-law-rooted kind of  
8 thing that is being brought in court -- I mean,  
9 sorry, brought in the administrative agency with  
10 all the concerns that many of my colleagues have  
11 raised.

12           MR. MCCOLLOCH: Okay. Well, there are  
13 several issues there. I'll -- I'll try to  
14 remember them and -- and address them all. And  
15 -- and all -- all good points, but keep in mind  
16 that the common law claims that -- that were  
17 incorporated into the securities acts are, in  
18 fact, litigated privately.

19           JUSTICE JACKSON: No, they're just --  
20 there -- there -- there's a parallel claim.  
21 There's the world that existed before, so a  
22 person who's injured by this kind of  
23 misrepresentation in their securities portfolio  
24 or whatever still has the common law scenario,  
25 they can go to court, bringing a fraud claim,

1 right?

2 I think this actually hurts you and  
3 your analysis. The fact that those still exist  
4 mean that Congress was not trying to take those  
5 over, shift those away. Congress created a new  
6 right, a new opportunity for the government to  
7 come in and for the benefit of the public make,  
8 yes, admittedly, a similar kind of claim, but I  
9 think you have to admit this is a new cause of  
10 action, right?

11 MR. MCCOLLOCH: Well, I do not agree  
12 with that.

13 JUSTICE JACKSON: Okay. All right.  
14 So that's where we diverge.

15 MR. MCCOLLOCH: If you go back -- if  
16 you -- if you -- if you -- if you look at fraud  
17 claims as litigated in the 1800s and early 1900s  
18 and even today, basic fraud cases, they -- they  
19 cite -- they -- they use the scheme or artifice  
20 to defraud, misrepresentations, violation of  
21 fiduciary, all of -- all of these issues that  
22 are litigated just in state courts today for  
23 fraud are litigated --

24 JUSTICE KAGAN: But, in state courts,  
25 there's always -- sorry, I'm over here.

1 (Laughter.)

2 JUSTICE KAGAN: There's always a  
3 requirement of reliance, there's always a  
4 requirement of injury, there's always a  
5 requirement of scienter. Some of these  
6 securities acts do not require scienter. Some  
7 of them do not require reliance or injury.

8 These are different kinds of causes of  
9 actions put in a different place with a  
10 different party on the other side of the V.

11 MR. MCCOLLOCH: And the mere fact that  
12 they've been modified a bit is --

13 JUSTICE KAGAN: A bit? No scienter?  
14 No reliance? No injury?

15 MR. MCCOLLOCH: Well, in -- in this  
16 case, he was alleged to have had scienter. He  
17 was alleged to have committed all of the terms  
18 of common law fraud that -- that -- in -- in  
19 this case. And our argument from the beginning  
20 has been that the -- the actual claims made  
21 against Jarkesy in this case are common law  
22 claims that -- that required a right to trial by  
23 jury under the Seventh Amendment.

24 JUSTICE SOTOMAYOR: But that wasn't  
25 what the government had to prove. Over here,

1 counsel. Right here, counsel.

2 MR. McCOLLOCH: Yes.

3 JUSTICE SOTOMAYOR: I have the mask  
4 on.

5 Can I back up a second? Mr. Fletcher  
6 pointed out that civil penalties were more  
7 recently added to the administrative process.  
8 If this law had been -- if this case had been  
9 heard previously, the SEC could have sought  
10 simply a cease-and-desist letter from doing  
11 whatever they were doing, an injunction, asked  
12 for disgorgement, which Justice Barrett pointed  
13 out was always a -- not a jury trial matter, and  
14 an injunction from doing certain things -- other  
15 things in the securities industry.

16 If that had been the -- the  
17 administrative process and the only thing the  
18 SEC had asked for, would your argument be  
19 identical, that that -- they had to go to court  
20 to ask for those things? If this is a common  
21 law fraud claim, but the only remedies they're  
22 seeking are common law remedies that don't  
23 require -- never required a jury, are you taking  
24 the position they had to go to a court  
25 nevertheless?

1                   MR. McCOLLOCH: And, Your Honor, your  
2     -- I think your question is -- is asking both  
3     under Article III and under Seventh Amendment.  
4     Seventh Amendment, no. We would not be arguing  
5     for the Seventh Amendment right for equitable  
6     relief. Remember, the -- the -- the test is was  
7     it a common law -- was it a claim recognized in  
8     the courts of England in 1791? And, number two,  
9     was it seeking a legal as opposed to other  
10    relief, mainly equity or admiralty? And so a --  
11    a claim for just disgorgement, at least under  
12    the law as it existed until 2021, as this Court  
13    held in the Liu case three years ago,  
14    disgorgement is an equitable remedy, and this  
15    Court went back to look at the law pre- --

16                  JUSTICE SOTOMAYOR: So you're saying  
17    they didn't require a jury trial, but that  
18    doesn't answer my first question. Would Article  
19    III have required --

20                  MR. McCOLLOCH: Article III.

21                  JUSTICE SOTOMAYOR: -- judicial  
22    adjudication?

23                  MR. McCOLLOCH: And I believe Article  
24    III would require that. The Seventh Amendment,  
25    though, would not.

1 JUSTICE SOTOMAYOR: All right. So  
2 you're basically going to that broader point  
3 that -- you're actually asking for that  
4 fundamental change that Mr. Fletcher talked  
5 about. You're saying any action has to go to  
6 federal court if it has an analogue in federal  
7 -- in common law.

8 MR. MCCOLLOCH: Yes, Your Honor. Yes.

9 JUSTICE SOTOMAYOR: Quite dramatic.

10 MR. MCCOLLOCH: And we believe that's  
11 --

12 JUSTICE SOTOMAYOR: I -- I'm not quite  
13 sure why that holding, which at common law  
14 included things -- like your own brief goes on  
15 and on about this, that if it was a deprivation  
16 of life, property, or -- life and property, you  
17 had to go to court.

18 I don't know why immigration --  
19 immigration issues don't have to go to court  
20 under that theory, why customs duties don't have  
21 to go to court, why any of the other things that  
22 you're exempting out wouldn't have gone to  
23 court. They all involve money.

24 MR. MCCOLLOCH: They all involve  
25 money, but there are certain things that have

1     been traditionally litigated or -- or  
2     adjudicated or assessed outside of the court  
3     process even back at the time of the founding.  
4     And so those -- those --

5                 JUSTICE SOTOMAYOR: That's a very --  
6     that's a very amorphous line. I'm --

7                 JUSTICE BARRETT: Well, I -- I'm  
8     sorry.

9                 JUSTICE SOTOMAYOR: I'm sorry, just  
10    one last question.

11                I'm assuming when we're being asked to  
12    change laws, we usually have a section saying  
13    stare decisis shouldn't apply here. The  
14    dramatic change that you're proposing in our  
15    approach and jurisdiction is going to have  
16    consequences across the board. We're going to  
17    have to decide questions like the one you  
18    assume, that that long list is exempt, but we're  
19    going to have to decide whether that's true, and  
20    we have a series of other agencies with very big  
21    responsibilities, start with the EPA, start with  
22    the Commodities Commission, the Postal Service,  
23    that can assess penalties for transporting  
24    hazardous materials in interstate traffic. All  
25    of those agencies will have to -- will have to



1 go to court, correct?

2 MR. MCCOLLOCH: Well, Your Honor, I  
3 think we're --

4 JUSTICE SOTOMAYOR: All of their  
5 proceedings are now nullified under your theory?

6 MR. MCCOLLOCH: I think that we -- we  
7 are not arguing for a big change in the law. We  
8 -- we --

9 JUSTICE SOTOMAYOR: I -- you've just  
10 said any -- any suit that seeks civil penalties  
11 that has an analog, and not an exact duplicate,  
12 but an analog in common law, has to go to  
13 federal court.

14 MR. MCCOLLOCH: Well, that's what this  
15 Court has held many times going back 200 years,  
16 and so --

17 JUSTICE SOTOMAYOR: For private -- for  
18 private suits.

19 MR. MCCOLLOCH: But there are certain  
20 things that have been deemed exempt from that  
21 under, again, another long strain of cases such  
22 as immigration, tax, et cetera, that -- and  
23 Social Security is like the easiest example.

24 The Chief Justice asked a little more  
25 difficult question about, you know, public

1 health benefits, but there's a long tradition of  
2 Social Security. That's a government benefit.  
3 You know, what the government giveth, it could  
4 taketh away. It can -- and it can adjudicate.  
5 And so those are just different.

6 This -- the argument we're making  
7 affects a tiny percentage of the total things  
8 that are handled -- that today are adjudicated  
9 administratively.

10 JUSTICE SOTOMAYOR: Should we --

11 MR. MCCOLLOCH: We're only --

12 CHIEF JUSTICE ROBERTS: Thank you.

13 JUSTICE SOTOMAYOR: Should we take you  
14 at your word, or should we have asked for  
15 briefing on the consequences?

16 MR. MCCOLLOCH: Well --

17 JUSTICE SOTOMAYOR: You didn't brief  
18 it. Some amici tried to, but it wasn't briefed.

19 MR. MCCOLLOCH: Well, and -- well --

20 JUSTICE SOTOMAYOR: It wasn't briefed  
21 by the government. It wasn't briefed by you.

22 MR. MCCOLLOCH: And -- and if -- if  
23 the Court wants supplemental briefing, we'd be  
24 happy to -- to offer a supplemental briefing.  
25 You know, we would, first of all, strongly

1     prefer that the Court deem the public/private  
2     rights doctrine more or less irrelevant to -- to  
3     -- to the assessment of or evaluation of the  
4     applicability of the Seventh Amendment. We  
5     believe that the subsequent cases have done  
6     that, and not just Granfinanciera.

7                 This -- this Court has very helpful in  
8     -- in -- in Stern v. Marshall in laying out  
9     descriptors of things of what -- what are really  
10    private rights. You know, this is an Article  
11    III case.

12                CHIEF JUSTICE ROBERTS: Yeah, thank  
13    you, counsel. I'd -- we have just been talking  
14    about areas that aren't covered, and you've  
15    mentioned a couple here. I wanted to know if  
16    you can give us, I realize it may not be  
17    completely, I'm not holding you to this, but a  
18    list of the areas that you think would not fall  
19    within the arguments that you're making today.

20                You've mentioned taxes. You've  
21    mentioned duties, Social Security benefits. Are  
22    there others that you would like to add, or  
23    maybe you can refer us to some place where you  
24    have a full list?

25                MR. MCCOLLOCH: You know, immigration.

1     There -- there are a number of areas. And it  
2     would probably be a -- a pretty long list of  
3     things that wouldn't be affected. Things --  
4     again, the best example is the OSHA regulations.  
5     Proper placement of ceiling covers, you know,  
6     those -- those kinds of things that are subject  
7     to sort of traffic ticket level fines just are  
8     not things that were ever recognized at common  
9     law.

10                 And most of the things that the  
11     Article I courts throughout the federal  
12     government do are, in fact, new claims that are  
13     regulatory issues, that don't have an analog in  
14     18th-century English practice.

15                 And so we're only talking about a tiny  
16     percentage. And -- and really here we're just  
17     talking about fraud claims, traditional fraud  
18     claims, and at least where they've been charged  
19     as traditional fraud claims, that -- and I know  
20     it's kind of -- the Court is going to be a  
21     little concerned, do we have to do  
22     case-by-case-by-case analysis of this? Well,  
23     unfortunately, for most things, you have to do a  
24     case-by-case analysis.

25                 The -- the whole public/private rights

1 doctrine is frankly a mess. It's not the  
2 Court's fault. It's because it's so -- it's a  
3 very difficult, vexing issue. And -- and this  
4 Court has declined actually to specifically  
5 define it itself. And maybe that's what you're  
6 asking us.

7           And so I don't mean to punt on the  
8 question, other than to say we're not asking for  
9 a big change in the law. And, you know, may --  
10 maybe the -- we're -- we're a little bit talking  
11 past each other. We're just saying when a --  
12 when a -- a common law claim or something  
13 approximating the -- the same purposes of a  
14 common law claim that existed 200 years ago in  
15 England, that is -- is thrown into a statutory  
16 scheme, that -- that that still requires the  
17 right to trial by jury, just like in  
18 Granfinanciera. It was in an Article I  
19 bankruptcy court, and the Court held even --  
20 they left -- this Court left alone whether or  
21 not that Article I assignment was okay. They  
22 left that alone and just sort of, okay, let's  
23 assume it is. We're still going to say -- for  
24 this fraudulent transfer claim that was a core  
25 proceeding incorporated into the statutory

1     scheme, we're saying you got a right to trial by  
2     jury for that.

3                 CHIEF JUSTICE ROBERTS:   Thank you,  
4     counsel.

5                 Justice Thomas?

6                 Justice Alito?

7                 JUSTICE ALITO:   Excuse me.   Could you  
8     complete this sentence for me?   A statutory  
9     claim is sufficiently close to a common law  
10    action for Seventh Amendment purposes when it...

11                MR. McCOLLOCH:   Serves the same  
12    essential function as a common law action  
13    recognized in the courts of England in 1791.

14                JUSTICE ALITO:   Serves the same  
15    essential function?

16                MR. McCOLLOCH:   Essential function.

17                JUSTICE ALITO:   And why would that not  
18    be true here?

19                MR. McCOLLOCH:   Well, it -- these  
20    fraud claims do serve the same essential -- in  
21    the Securities Acts, under 10b-5, do -- do serve  
22    the same function.

23                JUSTICE ALITO:   I'm sorry.   Why -- why  
24    is that the same here?

25                MR. McCOLLOCH:   Why is it the same?

1 JUSTICE ALITO: Yeah. I'm -- the --

2 MR. McCOLLOCH: Because it has all of  
3 the hallmarks --

4 JUSTICE ALITO: There was an erroneous  
5 "not" in there. Why is it the same?

6 MR. McCOLLOCH: Why isn't it?

7 JUSTICE ALITO: Why is it?

8 MR. McCOLLOCH: It's the same -- it's  
9 -- it's -- it's the same because it has all the  
10 same elements. There were -- there were cases  
11 back in 18th century England that were  
12 securities-type cases, fraud cases. There was  
13 one case that we cite in our brief that was  
14 rendered King v. Cawood in 1790, the year before  
15 the Seventh Amendment was enacted, where the  
16 government civilly prosecuted for penalties Mr.  
17 Cawood for violation of a financial fraud, a  
18 financial statute.

19 So this -- this is a fraud claim.  
20 They allege misrepresentations. They allege --  
21 they allege reliance. They allege materiality.  
22 And they allege damages.

23 JUSTICE ALITO: Well, were they  
24 required to allege all those things?

25 MR. McCOLLOCH: They were not

1 necessarily required to, but they did. And they  
2 usually do.

3 JUSTICE ALITO: Do you -- could we  
4 decide this case on the narrow ground that the  
5 statutory securities fraud claims are  
6 sufficiently close to a common law fraud action  
7 because the elements of the statutory claim are  
8 a logical subset of the latter?

9 MR. MCCOLLOCH: Yes, Your Honor.

10 JUSTICE ALITO: I know you think the  
11 public rights/private rights distinction is  
12 fuzzy, but do you think it's a difficult  
13 question whether Customs duties are public  
14 rights or private rights -- involve public  
15 rights or private rights? Same thing for  
16 immigration. Same things for taxation. Same  
17 thing for Social Security. Same thing for the  
18 Postal Service.

19 Do you think that's a tough question?

20 MR. MCCOLLOCH: No, Your Honor.

21 JUSTICE ALITO: Then why is it  
22 necessary for us to jettison that inquiry?

23 MR. MCCOLLOCH: Well, I don't think  
24 you need to. I mean, I -- I think -- I think  
25 that inquiry -- that's what -- been well



1 settled. Plenty of cases allowing immigration,  
2 Customs, all of those areas to be -- to be  
3 adjudicated administratively by the Executive  
4 Branch. And, again, were done backing the --  
5 most of those done back in the 1800s --

6 JUSTICE ALITO: Okay. Thank you.

7 MR. MCCOLLOCH: -- that way. So, it's  
8 a long tradition.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Sotomayor?

11 JUSTICE SOTOMAYOR: So explain your  
12 dividing line again? It serves the same  
13 essential functions as a common law right in  
14 suit? Can the government sue you without a  
15 statute for not paying your taxes?

16 MR. MCCOLLOCH: Without a statute?

17 JUSTICE SOTOMAYOR: Yes.

18 MR. MCCOLLOCH: No.

19 JUSTICE SOTOMAYOR: Can the government  
20 sue you for fraud under the common law, if you  
21 didn't have materiality, reliance -- and  
22 reliance?

23 MR. MCCOLLOCH: No.

24 JUSTICE SOTOMAYOR: Could they sue you  
25 in common law for fraud?

1                   MR. McCOLLOCH: If you defrauded the  
2 government.

3                   JUSTICE SOTOMAYOR: Exactly. But  
4 they're not charging you here with defrauding  
5 the government. They're not claiming injury to  
6 the individual -- to other individuals. They're  
7 claiming that the injury is to them.

8                   MR. McCOLLOCH: The -- the SEC --

9                   JUSTICE SOTOMAYOR: So the government,  
10 but not in terms of money.

11                  MR. McCOLLOCH: The SEC alleged --  
12 does alleged -- does allege in these cases in  
13 general and in --

14                  JUSTICE SOTOMAYOR: When you go into a  
15 private suit, other than a qui tam action where  
16 the government is letting you sue in their name,  
17 is the private individual recovering penalties  
18 for the government and its injuries to the  
19 securities market or is it -- is it recovering  
20 penalties for the individual's own injury?

21                  MR. McCOLLOCH: In this case?

22                  JUSTICE SOTOMAYOR: I didn't say this  
23 case. I'm asking you if a private citizen goes  
24 into court and seeks recovery under the SEC for  
25 a securities fraud, can they collect penalties

1 on behalf of the government?

2 MR. McCOLLOCH: No. In this case --

3 JUSTICE SOTOMAYOR: So what's the  
4 essential function that's the same in an action  
5 by the government and an individual?

6 MR. McCOLLOCH: This -- the --

7 JUSTICE SOTOMAYOR: The elements are  
8 not the same. The remedies go to one party, not  
9 the other. I'm -- I'm at a loss.

10 MR. McCOLLOCH: Okay, Your Honor. The  
11 -- the substantive elements are the same, which  
12 I think is the end of the inquiry, but to take  
13 it further, the SEC takes those penalties,  
14 according to them, they take most of the  
15 penalties and most of the disgorgement money  
16 that they take in and return it to the victims.

17 JUSTICE SOTOMAYOR: You know --

18 MR. McCOLLOCH: And so --

19 JUSTICE SOTOMAYOR: -- that's very  
20 generous of the government, but it's not -- you  
21 know, I can give my money to charity, but it's  
22 not the Court's right to -- the Court doing  
23 that. It's the SEC choosing to do that.

24 MR. McCOLLOCH: The SEC --

25 JUSTICE SOTOMAYOR: Just like the

1 victim could choose and probably does give the  
2 government some of the money in taxation. I'm  
3 not sure if penalties are exempt or not.

4 MR. MCCOLLOCH: Well, and sometimes  
5 courts frequently in these SEC fraud cases  
6 appoint receivers who are ordered by the court  
7 to collect money and return it to the -- to the  
8 investors. So -- but the SEC largely --

9 JUSTICE SOTOMAYOR: Thank you,  
10 counsel.

11 MR. MCCOLLOCH: -- acts today --

12 JUSTICE SOTOMAYOR: Thank you,  
13 counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan.

15 JUSTICE KAGAN: Mr. McColloch, if you  
16 look at the history of the securities  
17 legislation in this country, a lot of it came  
18 into effect, of course, after the great  
19 depression. And then there would have been two  
20 more recent tranches. One came after the  
21 savings and loan crisis, and the other came  
22 after the 2008 great recession, if you want to  
23 call it that.

24 And each time Congress thought, you  
25 know, something is going terribly wrong here and

1 people are being defrauded and people are being  
2 harmed. And these common law suits that you're  
3 talking about were not solving the problem.

4 And Congress said: We have to give  
5 the SEC responsibilities. We have to give them  
6 powers. We have to give them greater  
7 authorities. And I guess what I'm wondering is  
8 when you say: Well, we should go back to the  
9 common law suits that were brought 200 years ago  
10 in the courts of Westminster, I mean, is  
11 Congress's judgment after the depression, after  
12 the savings and loan crisis, after the great  
13 recession, is Congress's judgment that more  
14 powers were needed within an administrative  
15 agency entitled to no respect?

16 MR. MCCOLLOCH: No, it's entitled to  
17 lots of respect. And, again, everything that  
18 the -- that the Securities Acts do and  
19 everything the SEC does we support. And it  
20 doesn't have -- it's not a matter of not  
21 respecting Congress.

22 Congress acted appropriately, except  
23 insofar as they eventually in 1990, and then --  
24 in 1990 when they allowed the SEC to sue people  
25 outside of the regulatory universe, people that

1     were regulated and registered, they gave them  
2     the authority to come after any person.

3             And then in Dodd-Frank in 2010,  
4     allowed them to get penalties against any  
5     person. They didn't really use that power  
6     against any person when they couldn't get  
7     penalties. And so as soon as they got the  
8     penalty authority, that's when they could go  
9     after any person for securities fraud.

10            And our argument is, has been, and I  
11     believe the Fifth Circuit's holding is that  
12     basic securities fraud allegations, whether  
13     they're inside or outside of a statutory scheme,  
14     the nature of the claim is private. The nature  
15     of the claim, it's just exactly the same. It's  
16     -- it's analogous enough to common law claims  
17     that existed in 1791 in England --

18            JUSTICE KAGAN: Thank you.

19            MR. McCOLLOCH: -- and, therefore, the  
20     Seventh Amendment applies, period.

21            CHIEF JUSTICE ROBERTS: Justice  
22     Gorsuch.

23            JUSTICE GORSUCH: I just wanted to  
24     clarify a few things that I found confusing.

25            Under 10b-5, in addition to proving a

1 material misrepresentation, I thought scienter  
2 was required statutorily, correct?

3 MR. MCCOLLOCH: Yes, yes, Your Honor.

4 JUSTICE GORSUCH: Okay. And then I  
5 had thought that, as well, that for -- when they  
6 -- when the SEC seeks civil monetary penalties,  
7 it has to prove causation between the  
8 defendant's conduct and a loss to persons.

9 MR. MCCOLLOCH: Yes, yes, Your Honor.

10 JUSTICE GORSUCH: That's statutorily  
11 required?

12 MR. MCCOLLOCH: That's in the statute.

13 JUSTICE GORSUCH: Okay. So those  
14 elements all match up.

15 MR. MCCOLLOCH: They match up very  
16 neatly, yes.

17 JUSTICE GORSUCH: And I thought in  
18 Tull Justice Brennan made the point that there  
19 doesn't have to be a perfect common law analog.

20 MR. MCCOLLOCH: The -- the common law  
21 analog is a very low bar.

22 JUSTICE GORSUCH: Okay. And I thought  
23 he said that the more important thing were the  
24 penalties sought. That you look at the common  
25 law analog of the cause of action and the relief

1 sought and where those -- and he placed special  
2 emphasis on the second part.

3 MR. McCOLLOCH: Correct, Your Honor.  
4 And the main issue, the more important of the  
5 two elements was not the 1791 guidepost but was  
6 -- was actually whether or not the government is  
7 seeking penalties.

8 JUSTICE GORSUCH: Thank you.

9 MR. McCOLLOCH: So it's all about, you  
10 know, if the government is seeking penalties,  
11 the -- the government is required to take the  
12 case, again, under all of the other elements  
13 we've talked about, it's required to take the  
14 case in front of a jury if the -- if -- if -- if  
15 their target wants a jury trial.

16 JUSTICE GORSUCH: And Congress is free  
17 to proscribe that and extend that and expand it  
18 any way it wants.

19 MR. McCOLLOCH: Yeah.

20 JUSTICE GORSUCH: It just can't take  
21 away a person's right to be heard before his  
22 peers.

23 MR. McCOLLOCH: Correct. And for that  
24 matter, the SEC could fix this problem by itself  
25 this afternoon by giving people the option. The



1     problem here is that it's mandatory.  It's  
2     coercive.  Most of the other cases, situations  
3     at other agencies, people have an opt-out or  
4     they can choose which -- which forum they go in.

5             The problem here is that it's  
6     coercive.  And so the SEC gets to -- gets to  
7     unilaterally strip your Seventh Amendment and a  
8     number of other rights away.  By choosing that  
9     forum --

10            JUSTICE GORSUCH:  Thank you.

11            MR. MCCOLLOCH:  -- the SEC could fix  
12     that in a heartbeat.

13            JUSTICE GORSUCH:  Thank you.

14            CHIEF JUSTICE ROBERTS:  Justice  
15     Kavanaugh?

16            JUSTICE KAVANAUGH:  Yeah.  Two  
17     questions.  For those cases that are covered by  
18     your rule, whatever the scope of that is,  
19     agencies, I think, under your -- your approach  
20     could still bring those same suits in federal  
21     court, so there would still be full enforcement  
22     of all the regulatory statutes, environmental,  
23     securities, what have you.

24            But Mr. -- so I think I understand  
25     your point on that.  But Mr. Fletcher says

1     that's still a big problem because Congress  
2     would have to enact statutes that allowed  
3     agencies that don't have the authority to go to  
4     federal court to do so, and he says that would  
5     be a burden on federal courts.

6             And I just want to get any response  
7     you might have to that.

8             MR. MCCOLLOCH:  If -- if -- if there's  
9     a -- if there's a common law claim for penalties  
10    embedded in some of those statutes, then the  
11    answer is yes.

12            JUSTICE KAVANAUGH:  Well, that's not  
13    the question.  The question is what's -- what --  
14    what about the burden on federal courts that Mr.  
15    Fletcher raised, respond to that, and then the  
16    burden on agency enforcement for those agencies  
17    that don't have the authority to seek federal  
18    civil penalties in federal court now.

19            MR. MCCOLLOCH:  I could -- I could  
20    speak most authoritatively to -- to -- to the  
21    SEC and what effect it would have there.  The  
22    SEC, seeing the handwriting on the wall, has  
23    already, I believe, withdrawn or returned its --  
24    its securities fraud cases back to federal  
25    court.  So this whole notion of choking the

1 federal courts with lots and lots of cases is --  
2 it didn't happen because they've already been  
3 returned to the federal courts. Soon after they  
4 got this authority in 2010, it went way up, and  
5 then these constitutional challenges started  
6 getting filed and it went back down.

7 And so I don't think -- in fact, I  
8 think the -- the impact at the SEC if this Court  
9 upholds the Fifth Circuit on the Seventh  
10 Amendment will be zero. It'll be virtually  
11 nothing.

12 JUSTICE KAVANAUGH: Okay. And then  
13 second question is, if you're asking us, as some  
14 of the questions suggest, to scale back, narrow  
15 a precedent of ours in order that an individual  
16 has a right to federal court rather than an  
17 in-house tribunal, before we do that, we should  
18 know that it's more than just housekeeping, that  
19 it matters.

20 And you haven't really said, you know,  
21 it really matters to be in federal court rather  
22 than an in-house agency tribunal, and here's  
23 your opportunity.

24 MR. MCCOLLOCH: You mean it matters  
25 constitutionally or as a practical --

1 JUSTICE KAVANAUGH: No. Matters,  
2 like, you know, we could change precedent, but  
3 if it doesn't have any impact other than  
4 housekeeping of where you file your briefs,  
5 which tribunal you file it in, then, you know,  
6 that's -- that's a lot to ask us to narrow a  
7 precedent --

8 MR. McCOLLOCH: Well --

9 JUSTICE KAVANAUGH: -- for where you  
10 file your briefs.

11 But does it matter?

12 MR. McCOLLOCH: It -- it -- it matters  
13 --

14 JUSTICE KAVANAUGH: See, all right.  
15 It obviously does, but how and why and how much?

16 MR. McCOLLOCH: It matters -- it  
17 matters quite a bit, you know, to -- even beyond  
18 the right to trial by jury, which -- which is  
19 the most important of the ramifications, but  
20 there's all kinds of due process issues. There  
21 are prejudgment issues embedded in this whole  
22 process. There are a number of -- we had -- we  
23 had two other issues that we raised in the Fifth  
24 Circuit that they just left behind because they  
25 thought they had bitten off enough with -- with

1     these three issues that the Court granted cert  
2     on.

3                 So the -- and if we did get back and  
4     if you rule against us on everything, we've  
5     still got -- they -- we've got civil --

6                 JUSTICE KAGAN: More is coming?

7                 MR. MCCOLLOCH: -- issues still  
8     coming.

9                 (Laughter.)

10                MR. MCCOLLOCH: So -- but we think the  
11     Court will uphold the Seventh Amendment right  
12     here, and the -- the difference between going to  
13     federal court -- and I've done both -- going to  
14     federal court and going to an administrative  
15     proceeding is stark.

16                The -- the discovery rights are almost  
17     zero. The -- the Division of Enforcement gets a  
18     one- or two- or three-year head start on you.  
19     They then give you an 8-terabyte disk that you  
20     can't even search and say you're going to trial  
21     in three or four months, and -- and off you go.

22                The Rules of Evidence don't apply.  
23     The hearsay rule doesn't apply except when it  
24     does. When we tried to get hearsay admitted, it  
25     was -- it was denied because the hearsay --

1     because of the hearsay rule, when the Division  
2     of Enforcement tried to get and did get copious  
3     evidence into -- into the record, and we  
4     objected to hearsay, the --

5             JUSTICE KAVANAUGH:   Okay.

6             MR. McCOLLOCH:   -- ALJ said --

7             JUSTICE KAVANAUGH:   Thank you.

8             MR. McCOLLOCH:   -- hearsay doesn't  
9     apply.

10            JUSTICE KAVANAUGH:   Thank you.

11            MR. McCOLLOCH:   It makes a big  
12     difference.

13            CHIEF JUSTICE ROBERTS:   Justice  
14     Barrett?

15            JUSTICE BARRETT:   I have a question  
16     about equitable remedies.   So, when I talked to  
17     Mr. Fletcher about whether the SEC would still  
18     be able to get injunctive relief and  
19     disgorgement, because they're equitable  
20     remedies, Mr. Fletcher expressed concern that  
21     the Court in deciding the Seventh Amendment  
22     question in your favor might actually limit the  
23     ability of agencies to get equitable remedies.

24            And then, when Justice Sotomayor asked  
25     you some questions about that, you said the

1 Seventh Amendment would not stand as a barrier  
2 in that context, but Article III would.

3 So, if we decided in your favor on the  
4 Seventh Amendment question, do you think that  
5 would necessarily resolve any kind of Article  
6 III question? And if not, why did you even  
7 bring it up?

8 MR. McCOLLOCH: Well, I -- I don't  
9 know that we did bring it up. It's just it's --

10 JUSTICE BARRETT: Well, you brought it  
11 up to Justice Sotomayor.

12 MR. McCOLLOCH: Well, I did. I  
13 thought that was part of her question. But what  
14 -- what I was -- what I was trying to say is,  
15 number one, the Seventh Amendment issue doesn't  
16 require the Court necessarily to resolve the  
17 Article III issue. We don't think that the  
18 Article III public/privates rights --  
19 public/private right analysis is even necessary  
20 to resolve this case under the Seventh  
21 Amendment, which is the issue that was raised  
22 below, the issue that was ruled on below.

23 JUSTICE BARRETT: But doesn't it bear  
24 on it? Because, if you're looking to see what  
25 was a suit at common law, I mean, isn't that

1 private right?

2 MR. McCOLLOCH: I will say most of the  
3 time, 95 percent of the time, the analysis under  
4 public/private rights and the analysis under  
5 Seventh Amendment for whether it was a common  
6 law -- a claim that existed at common law is  
7 going to come out the same. It comes out with  
8 the same result.

9 And that's why this -- this construct  
10 has worked for the last 50, 60 years, and maybe  
11 no one's challenged it for -- for that reason.  
12 And that's why we're saying we can -- we can  
13 live with Atlas Roofing because Atlas Roofing  
14 properly construed and as it's been  
15 substantially modified by a number of subsequent  
16 decisions comes to the same result.

17 JUSTICE BARRETT: So is -- let's see.  
18 You said that on the Seventh Amendment question,  
19 our deciding in your favor would work a very  
20 small change?

21 MR. McCOLLOCH: Yes, Your Honor.

22 JUSTICE BARRETT: But it sounds to me  
23 that what you're really hoping for deep down is  
24 a really big change because you want even the  
25 equitable remedies cases out of agencies too.



1 MR. MCCOLLOCH: We don't have --

2 JUSTICE BARRETT: Is that --

3 MR. MCCOLLOCH: -- a position on that.

4 We -- because we're not here -- Jarkesy does not  
5 have an equitable remedy issue to -- to worry  
6 about. It's a -- we only raised a Seventh  
7 Amendment issue, and it was because of the  
8 penalties, and it was because of Dodd-Frank.

9 JUSTICE BARRETT: Notwithstanding what  
10 you told Justice Sotomayor?

11 MR. MCCOLLOCH: Notwithstanding what I  
12 told Justice Sotomayor.

13 JUSTICE BARRETT: Okay. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Jackson?

16 JUSTICE JACKSON: So I've heard you  
17 say several times that we can live with Atlas  
18 Roofing, and I'm trying to understand why, and  
19 I'm reading the part of Atlas Roofing where  
20 they're describing the past cases that they've  
21 -- that the Court is relying on. And it seems  
22 as though the basic proposition is, when  
23 Congress creates new statutory public rights, it  
24 may assign their adjudication to an  
25 administrative agency with which a jury trial

1 would be incompatible without violating the  
2 Seventh Amendment's injunction that jury trial  
3 is to be preserved in suits at common law.

4 All right. So I think that's the sort  
5 of basic proposition, and I understand your  
6 argument to be this is not the creation of a new  
7 statutory public right.

8 MR. McCOLLOCH: Correct, Your Honor.

9 JUSTICE JACKSON: All right. So  
10 Justice Sotomayor asks and Justice Kagan asked a  
11 lot of questions probing that part of this. And  
12 so your answer is, even though the elements are  
13 different, there's some overlap, as Justice  
14 Gorsuch points out. But are the elements of  
15 this 10b-5 action the same on all fours with  
16 common law fraud?

17 MR. McCOLLOCH: Yes, as -- as they  
18 were alleged in this case. Yes.

19 JUSTICE JACKSON: But I'm not talking  
20 about the allegations. I'm talking about the  
21 elements, what the government had to prove in  
22 order to establish a violation of 10b-5.

23 MR. McCOLLOCH: They are substantially  
24 the same and certainly serve the same essential  
25 function as -- as a -- as a traditional --

1 JUSTICE JACKSON: Right, but --

2 MR. McCOLLOCH: -- common law fraud  
3 claim.

4 JUSTICE JACKSON: -- but, in Atlas  
5 Roofing, we had the service of the same  
6 essential function of a tort claim. But  
7 Congress -- the Court here still said it was new  
8 statutory claim. It described the circumstances  
9 under which it arise -- it arose and called it  
10 new.

11 So I guess I'm trying to understand  
12 why here, even though you're right, the  
13 allegations, one could have made perhaps a  
14 standard common law fraud claim out of the  
15 allegations, if the elements of the statutory  
16 claim are different, why are you suggesting that  
17 it is not new?

18 MR. McCOLLOCH: Well, so I would push  
19 back on -- on the notion that the OSHA  
20 regulatory prophylactic claims sound in tort.  
21 They don't sound in tort.

22 JUSTICE JACKSON: Because?

23 MR. McCOLLOCH: Because you don't have  
24 to have any injury. If -- if -- again --

25 JUSTICE JACKSON: Do you have to have

1 injury here as an element?

2 MR. MCCOLLOCH: You do not have to  
3 have injury as an element but to get damages you  
4 do, so you --

5 JUSTICE JACKSON: No, I understand,  
6 but as an element, right, you say the OSHA  
7 claims didn't have the injury element. We don't  
8 have that element here either.

9 So why are these claims old and those  
10 claims new?

11 MR. MCCOLLOCH: Be -- because those  
12 claims are -- again, they're so -- they're so  
13 prophylactic as to whether you're ceiling cover  
14 is in exactly the right position, no one could  
15 sue in tort over that. Because there's no --

16 JUSTICE JACKSON: Because the duty is  
17 arising out of the -- the -- the statutory.

18 MR. MCCOLLOCH: Only out of the  
19 statute.

20 JUSTICE JACKSON: All right. And the  
21 duty here is arising out of the statute in the  
22 same way, I think, but let me just ask you this.  
23 You keep talking about Granfinanciera, if I'm  
24 pronouncing it correct. I guess I'm a little  
25 worried about the rule that you're asking us to

1     adopt insofar as it's suggesting that it doesn't  
2     have to be a common law claim that Congress has  
3     appropriated on all fours with all the elements.

4             It can be something that is like a  
5     common law claim.

6             MR. MCCOLLOCH:   Yes, Your Honor.

7             JUSTICE JACKSON:   And I just don't  
8     know where that comes from.   Because the  
9     Granfinanciera case, it was the fraudulent  
10    conveyance claim.   It was the sort of scary  
11    scenario in which Congress is moving actual  
12    common law claims into the administrative  
13    process or in that case into the bankruptcy  
14    process, and the Court rightly said no, I'm  
15    sorry, you have a Seventh Amendment problem with  
16    doing that.

17            So I -- I don't know that  
18    Granfinanciera gives you the rule that we have  
19    previously held that something tat looks like a  
20    common law claim, even though it's statutorily  
21    new, raises the same kind of Seventh Amendment  
22    issue.

23            MR. MCCOLLOCH:   Well, you know, so  
24    really what Granfinanciera stands for in this  
25    case is -- is, again, the condemnation of

1 taxonomic changes and --

2 JUSTICE JACKSON: But it's only  
3 taxonomic if it's actually the same claim,  
4 right?

5 MR. McCOLLOCH: It's --

6 JUSTICE JACKSON: I mean, if it's --  
7 if it's the same claim on all fours and Congress  
8 is just changing the name then I get you, we  
9 have exactly the problem that the Seventh  
10 Amendment is concerned about.

11 What I'm still worried about is you're  
12 saying Congress can create a new claim but as  
13 long as it looks kind of like a common law claim  
14 or it's substantially close, I -- I don't really  
15 know what the -- how close it has to be, but as  
16 long as it kind of looks like a -- a common law  
17 claim, the same Seventh Amendment concerns  
18 arise.

19 And I don't know that we've ever said  
20 that before.

21 MR. McCOLLOCH: And I the Court has  
22 said that. Again --

23 JUSTICE JACKSON: In what case?

24 MR. McCOLLOCH: The -- the same  
25 essential function test. Give me a moment, I

1 can find you -- and I know we have cases in our  
2 brief that -- that -- that do cite that. And in  
3 Stern v. Marshall, which is one of the most --  
4 one of the two most recent cases where the  
5 courts at least dealt with what constitutes  
6 private right versus public right, this Court  
7 gave a sort of a -- a nice listing of about five  
8 examples of -- of how you can tell the  
9 difference.

10 And a private right says that the  
11 underlying claim for relief, quote, "does not  
12 flow from a federal statutory scheme, as in  
13 Thomas, or is not completely dependent upon  
14 adjudication of a claim created by federal law."

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Rebuttal, Mr. Fletcher?

19 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

20 ON BEHALF OF THE PETITIONER

21 MR. FLETCHER: Thank you, Mr. Chief  
22 Justice. I'd like to say just a quick word  
23 about removal and then talk about the Seventh  
24 Amendment issue.

25 So, on removal, I just want to take it

1 at a 30,000 foot level. I think the lesson from  
2 this Court's cases is -- is that a removal is  
3 about accountability and control.

4 And in Free Enterprise Fund, there was  
5 a real concern that the president regulated  
6 parties and the public wouldn't know whether or  
7 not the Securities and Exchange Commission  
8 actually supported the enforcement and policy  
9 actions that the Board was taking or just had to  
10 tolerate those actions because of the strict  
11 removal protection.

12 Now, apply those same questions here  
13 and you get exactly the opposite results. Here  
14 we know exactly what the Commission thinks about  
15 the ALJ's decision in this case because the  
16 Commission had the right to and exercised the  
17 right to conduct plenary review, adopt parts of  
18 it, and reject other parts of it.

19 I think that's constitutionally  
20 adequate means of supervision of adjudicative  
21 officers. We think that's the lesson from the  
22 plurality opinion in Arthrex.

23 Also, in Free Enterprise Fund, this  
24 Court said the most telling problem with this  
25 the scheme it confronted there was its novelty.



1 That's the through line of this Court's recent  
2 cases like Seila Law, like Arthrex, like  
3 Collins.

4 No foothold in history or tradition is  
5 a telling constitutional problem. Here it goes  
6 the other way. The removal protection for ALJs  
7 has been a central feature of administrative law  
8 since the APA.

9 Now, on the Seventh Amendment,  
10 obviously the focus is Atlas Roofing. And I  
11 think my friend has to do one of three things.  
12 He has to distinguish it, he has to convince you  
13 you've overruled it already or he has to  
14 convince you that you should overrule it now.  
15 And I don't think he's done any of those.

16 So first of all, on distinguishing it,  
17 I think it's helpful to be very concrete about  
18 what was at issue in Atlas Roofing. The statute  
19 at issue there said, and I quote, "that  
20 employees had a right to be a workplace free  
21 from recognized hazards that were likely to  
22 cause serious injury or death."

23 What had happened was that one  
24 employer failed to shore up a trench and it  
25 collapsed and an employee died and another

1 employee fell through an open roof and died.

2 Those things could have been the basis  
3 for wrongful death or negligence actions  
4 evaluated under very similar standards and yet  
5 the Court had no problem saying that they were  
6 validly enforced through administrative  
7 proceedings because Congress had created a  
8 federal statutory scheme.

9 It has done the same thing here. The  
10 securities laws serve different purposes than  
11 the common law of fraud. Congress is not just  
12 taking and federalizing disputes between private  
13 parties adjudicated in courts of common law. I  
14 think the clearest indication of that is this  
15 Court's decision in Kokesch, which explained why  
16 the remedies that the SEC gets, even when they  
17 are monetary or compensatory, are not for  
18 private parties. They are remedies for a public  
19 wrong and they are therefore properly considered  
20 penalties. I think for much the same reason,  
21 this is not the case where you have a concern  
22 about circumvention of the common law rights.

23 I think the other thing that I would  
24 say is that he has tried to convince you that  
25 you've overruled Atlas Roofing already in

1 Granfinanciera but the parts of the opinion that  
2 he is talking about and with respect, Justice  
3 Gorsuch, that you have quoted, are about suits  
4 between private parties.

5           When you talk about suits involving  
6 the government, Granfinanciera is explicit. It  
7 says, "even when Congress does something that is  
8 closely analogous," that's a quote from the  
9 common law, or effectively supplants a common  
10 law cause of action with a new statutory cause  
11 of action enforced by the government, that is  
12 something that it can assign to an  
13 administrative tribunal.

14           So finally that leaves him, I think,  
15 asking you to overrule Atlas Roofing in one way  
16 or another, on Seventh Amendment or on public  
17 rights. And I think there are several reasons  
18 not to do that.

19           One is that my friend just hasn't  
20 asked. As Justice Sotomayor said, the word  
21 "stare decisis" do not appear in his brief.  
22 Even now I don't think he has grappled with the  
23 practical consequences of adopting any of the  
24 rules that he has offered and I also don't think  
25 he's given you a new principle to adopt.

1                   So I take the point, Justice Alito,  
2     about immigration cases and tax cases and  
3     customs cases in some ways those sound like  
4     public rights but the cases involve the  
5     imposition of penalties, the requirement of  
6     private parties to pay penalties for violating  
7     those statutes.

8                   If you look at it from a private  
9     party's perspective, that's a private party just  
10    like the civil penalty here. The Seventh  
11    Amendment and Article III don't apply  
12    differently in the immigration space. When the  
13    government seeks immigration penalties in court,  
14    it has to do it in front of a jury.

15                  So the reason why the government can  
16    get administrative penalties in immigration  
17    cases and in those other cases is because that  
18    is not an invasion of Article III. It is not a  
19    violation of the Seventh Amendment. And for the  
20    reasons that the Court said in *Atlas Roofing*,  
21    the same thing is true here.

22                  So finally I would just like to say,  
23    you know, going back to this Court's decision in  
24    *Brackeen* last year, the Court said the parties  
25    before us have raised real concerns with our

1 past precedent. They've made arguments based on  
2 history, but they haven't taken on the burden  
3 that we expect parties to take on when they ask  
4 us to overrule precedent.

5 They haven't acknowledged what they're  
6 asking for. They haven't grappled with practice  
7 and principle and so whatever those arguments  
8 might be in a future case, we're not going to  
9 engage with them here.

10 I think you should do the same thing  
11 today. I think you can reverse the decision  
12 below and uphold the Securities and Exchange  
13 Act's provisions at issue here without going one  
14 inch beyond Atlas Roofing. And I think a  
15 decision reversing the -- the Fifth Circuit on  
16 that basis would leave the law exactly where you  
17 found it today.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel. Counsel.

21 The case is submitted.

22 (Whereupon, at 12:22 p.m., the case  
23 was submitted.)

24

25

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